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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1939

No. 92

JOHN E. MADDEN, JR., EXECUTOR OF THE ESTATE OF JOHN E. MADDEN, DECEASED, APPELLANT,

vs.

COMMONWEALTH OF KENTUCKY, BY JAMES W. MARTIN, COMMISSIONER OF REVENUE OF THE COMMONWEALTH OF KENTUCKY

APPEAL FROM THE COURT OF APPEALS OF THE COMMONWEALTH OF KENTUCKY

FILED JUNE 8, 1939.

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[fol. 1] [Caption omitted]

[fol. 2] **IN COUNTY COURT OF FAYETTE COUNTY**

COMMONWEALTH OF KENTUCKY by M. J. BRENNAN, Revenue Agent for the State at Large, Plaintiff,

vs.

JOHN E. MADDEN, JR. and JOSEPH E. MADDEN, Executors of the Estate of John E. Madden, Deceased, Defendants

STATEMENT—Filed Oct. 10, 1932

The Plaintiff, Commonwealth of Kentucky, by M. J. Brennan, duly appointed, qualified and acting Revenue Agent for the State at Large, states that this statement, before being filed, was approved by the State Tax Commission of the State of Kentucky, and that John E. Madden was a resident of Fayette County, Kentucky, on the 1st day of July, 1924, and continuously thereafter until the date of his death on November, 1929; that John E. Madden died on the — day of November, 1929, a resident of Fayette County, Kentucky, and that his Will was duly and regularly offered for probate in the County Court of Fayette County, Kentucky, on January 10th, 1930, and it was then and there duly proved and admitted to probate in said Court, by order of said court, and that by the terms of said Will, John E. Madden, Jr. and Joseph M. Madden were nominated and designated as the Executors of the last will and Testament of John E. Madden, deceased, and that on said January 10, 1930, the said John E. Madden, Jr. accepted, in said court, to serve as one of the Executors of the last will and testa-

[fol. 3] ment of said John E. Madden, deceased, and he then and there duly qualified and gave bond as such Executor, in said Court and on January 21st, 1930, the said Joseph M. Madden accepted, in said Court, to serve as one of the Executors of the last will and testament of said John E. Madden, deceased, and he then and there duly qualified and gave bond as such Executor, in said Court, and that the said John E. Madden, Jr. and Joseph M. Madden, have ever since the respective dates of becoming executors, as aforesaid, been the joint executors of the estate of John E. Madden, deceased, and are such at the present time, and both have been residents of Fayette County, Kentucky, ever since the respective dates of their said appointments; and

that on each of the assessing dates of July 1st, in each of the years of 1924, 1925, 1926, 1927 and 1928 and 1929, the said John E. Madden, now deceased, was the owner of personal property as follows, to wit:

On July 1st, 1924, 2,540 shares of the capital stock of Corn Products Refining Company, 33 shares of the capital stock of Bush Terminal Company, 333 shares of the capital stock of United States Steel Corporation, 66 shares of the capital stock of American Steel Foundry Company, 500 shares of the capital stock of Standard Oil Company of New Jersey, 66 shares of the capital stock of Anaconda Copper Company, 33 shares of the capital stock of Murray Corporation of America, 33 shares of the capital stock of Columbia Gas and Electric Corporation, 366 shares of the capital stock of Union Carbide and Carbon Company, 33 shares of the capital stock of Bendix Aviation Corporation and 340 shares of the capital stock of Commercial Solvents Corporation, and all of said shares of capital stock having a fair cash value of $395,000.00 on said date, and money on deposit in the Title Guaranty Trust Company in New York [fol. 4] City, the National City Bank in New York City, and the Bank of Manhattan in Long Island, State of New York, amounting to $52,000.00, and the promissory notes of J. S. Cosden, H. D. Bronless and W. B. Miller, in the principal sum of $19,700.00, and all of said property being of the fair cash value of $466,700.00;

On July 1st, 1925, 2,540 shares of the capital stock of Corn Products Refining Company, 33 shares of the capital stock of Bush Terminal Company, 333 shares of the capital stock of United States Steel Corporation, 66 shares of the capital stock of American Steel Foundry Company, 500 shares of the capital stock of Standard Oil Company of New Jersey, 66 shares of the capital stock of A-conda Copper Company, 33 shares of the capital stock of Murray Corporation of America, 33 shares of the capital stock of Columbia Gas and Electric Corporation, 366 shares of the capital stock of Union Carbide and Carbon Company, 33 shares of the capital stock of Bendix Aviation Corporation and 340 shares of the capitol stock of Commercial Solvents Corporation, and all of said shares of capital stock having a fair cash value of $398,000.00 on said date, and money on deposit in the Title Guaranty Trust Company in New York City, the National City Bank in New York City, and the

Bank of Manhattan in Long Island, State of New York, amounting to $50,000.00, and the promissory notes of J. S. Cosden, H. L. Brownlee and W. B. Miller, in the principal sum of $19,700.00 and having a fair cash value of $19,700.00, and all of said property being of the fair cash value of $467,700.00;

[fol. 5] On July 1st, 1926, 2,540 shares of the capital stock of Corn Products Refining Company, 33 shares of the capital stock of Bush Terminal Company, 333 shares of the capital stock of United States Steel Corporation, 66 shares of the capital stock of American Steel Foundry Company, 500 shares of the capital stock of Standard Oil Company of New Jersey; 66 shares of the capital stock of Anaconda Copper Company, 33 shares of the capital stock of Murray Corporation of American, 33 shares of the capital stock of Columbia Gas and Electric Corporation, 366 shares of the capital stock of Union Carbide and Carbon Company, 33 shares of the capital stock of Bendix Aviation Corporation and 340 shares of the capital stock of Commercial Solvents Corporation, and all of said shares of capital stock having a fair cash value of $390,000.00, on said date, and money on deposit in the Title Guaranty Trust Company in New York City, the National City Bank in New York City, and the Bank of Manhattan in Long Island, State of New York, amounting to $45,000.00, and the promissory notes of J. S. Cosden, H. D. Brownless and W. B. Miller, in the principal sum of $19,700.00 and having a fair cash value of $19,700.00 and all of said property being of the fair cash value of $454,700.00;

On July 1st, 1927, 2,440 shares of the capital stock of Corn Products Refining Company, 33 shares of the capital stock of Bush Terminal Company, 333 shares of the capital stock of United States Steel Corporation, 66 shares of the capital stock of American Steel Foundry Company, 500 shares of the capital stock of Standard Oil Company of New Jersey, 66 shares of the capital stock of Anaconda Copper Company, [fol. 6] 33 shares of the capital stock of Murray Corporation of American, 33 shares of the capital stock of Columbia Gas and Electric Corporation, 366 shares of the capital stock of Union Carbide and Carbon Company, 33 shares of the capital stock of Bendix Aviation Corporation and 340 shares of the capital stock of Commercial Solvents Corporation, and all of said shares of capital stock having a fair cash value of $407,000.00, on said date, and money on deposit in

the Title Guaranty Trust Company in New York City, the National City Bank in New York City, and the Bank of Manhattan in Long Island, State of New York, amounting to $60,000.00, and the promissory notes of J. S. Cosden, H. L. Brownless and W. B. Miller, in the principal sum of $19,700.00 and having a fair cash value of $19,700.00 and all of said property being of the fair cash value of $486,700.00;

On July 1st, 1928, 2,540 shares of the capital stock of Corn Products Refining Company, 33 shares of the capital stock of Bush Terminal Company, 333 shares of the capital stock of United States Steel Corporation, 66 shares of the capital stock of American Steel Foundry Company, 500 shares of the capital stock of Standard Oil Company of New Jersey, 66 shares of the capital stock of Anaconda Copper Company, 33 shares of the capital stock of Murray Corporation of America, 33 shares of the capital stock of Columbia Gas and Electric Corporation, 366 shares of the capital stock of Union Carbide and Carbon Company, 33 shares of the capital stock of Bendix Aviation Corporation and 340 shares of the capital stock of Commercial Solvents Corporation, and all of said shares of capital stock having a fair cash value of $405,000.00 on said date, and money on deposit in the Title Guaranty Trust Company in New York City, the National City Bank in New York City, and the Bank of Manhattan in Long Island, State of New York, amounting to [fol. 7] $55,000.00, and the promissory notes of J. S. Cosden, H. L. Bro-nlee and W. B. Miller, in the principal sum of $19,700.00 and having a fair cash value of $19,700.00 and all of said property being of the fair cash value of $479,700.00;

On July 1st, 1928, 2,540 shares of the capital stock of Corn Products Refining Company, 33 shares of the capital stock of Bush Terminal Company, 333 shares of the capital stock of United States Steel Corporation, 66 shares of the capital stock of *of* American Steel Foundry Company, 500 shares of the capital stock of Standard Oil Company of New Jersey, 66 shares of the capital stock of Anaconda Copper Company, 33 shares of the capital stock of Murray Corporation of America, 33 shares of the Capital stock of Columbia Gas and Electric Corporation, 366 shares of the capital stock of Union — and Carbon Company, 33 shares of the capital stock of Bendix Aviation Corporation and 340 shares of the capital stock of Commercial Solvents Corporation, and all of said shares of capital stock having a fair cash value of

$407,000.00 on said date, and money on deposit in the Title Gu-ranty Trust Company in New York City, the National City Bank in New York City, and the Bank of Manhattan in Long Island, State of New York, amounting to $55,000.00, and the promissory notes of J. S. Cosden, Mrs. P. P. Flaherty, H. L. Brownless and W. B. Miller, in the principal sum of $21,200.00, and all of said property being of the fair cash value of $483,200.00;

On July 1st, 1930, the estate of John E. Madden, deceased, was the owner of the following personal property in Fayette County, Kentucky, and that the said John E. Madden, Jr. and Joseph M. Madden, as Executors of said estate, as aforesaid, were in possession of the following described personal property, and said property was being admin- [fol. 8] istered by said Executors in Fayette County, Kentucky, and in the County Court thereof, said personal property being as follows, to-wit: 2,540 shares of the capital stock of Corn Products Refining Company, 33 shares of the capital stock of Bush Terminal Company, 333 shares of the capital stock of United States Steel Corporation, 66 shares of the capital stock of American Steel Foundry Company, 500 shares of the capital stock of Standard Oil Company of New Jersey, 66 shares of the capital stock of Anaconda Copper Company, 33 shares of the capital stock of Murray Corporation of America, 33 shares of the capital stock of Columbia Gas and Electric Corporation, 366 shares of the capital stock of Union Carbide and Carbon Company, 33 shares of the capital stock of Bendix Aviation Corporation and 340 shares of the capital stock of Commercial Solvents Corporation, and all of said shares of capital stock having a fair cash value of $405,000.00 on said date, and money on deposit in the Title Guaranty Trust Company in New York City, the National City Bank in New York City, and the Bank of Manhattan in Long Island, State of New York, amounting to $47,000.00, and the promissory notes of J. S. Cosden, Mrs. P. P. Flaherty, H. L. Brownlee and W. B. Miller, in the principal sum of $21,200. and having a fair cash value of $21,200 and all of said property being of the fair cash value of $473,200.00; all of which property was wholly omitted from assessment for taxation for state purposes with the Assessor of Fayette County, Kentucky, or any other assessing officer or assessing board of said county

or of the State of Kentucky, on each of the dates aforesaid, and that the tax thereon is now delinquent.

Wherefore, plaintiff prays judgment that said property be assessed against the defendants herein, John E. Madden, Jr. and Joseph M. Madden, as Executors of the estate of John E. Madden, deceased, as of each of the dates afore-[fol. 9] said, at the respective valuations named, and that they be adjudged liable to the Commonwealth of Kentucky and Fayette County for the tax on said property for the years of 1925, 1926, 1927, 1928, 1929, 1930 and 1931, together with the statutory penalty of 100% due the state of Kentucky for all of said years and 6% interest on each year's taxes from the date they should have been paid and also 20% penalty due the Revenue Agent on the total amount of said tax. Plaintiff prays for its costs herein expended and for all further and proper relief.

Commonwealth of Kentucky, by M. J. Brennan, Revenue Agent for the State At Large.

Harry D. Kremer, Attorney for Plaintiff.

Approved, October 8th, 1932.

State Tax Commission, by C. R. Glenn.

[File endorsement omitted.]

[fol. 10] In County Court of Fayette County

Amended Statement—Filed January 16, 1933

Comes the plaintiff, and for amendment to the Statement herein, says that Joseph M. Madden died on October 31st, 1932, and therefore, is not now, nor has been since said date, a joint Executor of the estate of John E. Madden, deceased. Plaintiff says that John E. Madden, Jr., has been the sole Executor of the estate of John E. Madden, deceased, since October 31st, 1932.

Wherefore, plaintiff prays that this action be henceforth prosecuted against John E. Madden, Jr., Executor of the estate of John E. Madden, deceased, and plaintiff prays as in its original Statement.

Harry D. Kremer, Attorney for Plaintiff.

[File endorsement omitted.]

[fol. 11] IN COUNTY COURT OF FAYETTE COUNTY

MOTION TO DISMISS AND ANSWER—Filed February 14, 1933

The defendant, John E. Madden, Executor of the Estate of John E. Madden, deceased, (hereinafter called the executor) for answer to the statement herein, states as follows:

Paragraph I

The Executor states that the plaintiff herein, has not made to the Executor any demand for the payment of any of the sums sued for herein, has not filed any affidavit with the Executor, or with any personal representative of J. E. Madden, deceased, pursuant to Kentucky Statutes 3870-3872, and the Executor moves the Court for a Rule against the plaintiff, M. J. Brennan, Revenue Agent for the State at Large, to show cause why this action should not be dismissed, because demand was not made before the suit was brought, and the Executor says that this suit should be dismissed because of the failure to make such demand, as required by the statute, before the institution of this suit.

Paragraph II

Without waiving the defense set up in Paragraph I, herein, the Executor states as follows:

The Executor does not have sufficient knowledge or information to form a belief whether the statement herein was approved by the State Tax Commission of the State of Kentucky, before being filed, or at any time.

The Executor denies that on each, or any, of the assessing dates of July 1st, in each, or any of the years 1924, 1925, 1926, 1927, 1928, or 1929, the said John E. Madden, deceased, was the owner of any of the personal property set out in the [fol. 12] statement herein; and denies that on July 1st, 1924, he was the owner of 2,540, or any, shares of the capital stock of Corn Products Refining Company, or 33, or any of the shares of the capital stock of Bush Terminal Company, or 333, or any shares of the capital stock of United States Steel Corporation, or 66, or any shares of the capital stock of American Steel Foundry Company, or 500, or any shares of the capital stock of the Standard Oil Company of New Jersey, or 66, or any shares of the capital stock of Anaconda Copper Company, or 33, or any shares of the capital stock

of Murray Corporation of America, or 33, or any shares of the capital stock of Columbia Gas and Electric Corporation, or 366, or any of the shares of the capital stock of Union Carbide and Carbon Company, or 33, or any shares of the capital stock of Benedix Aviation Corporation, or 340, or any shares of the capital stock of Commercial Solvents Corporation, or that all, or any, of such shares of capital stock, had a fair cash value of $395,000.00 or any sum, on said date, or money on deposit in the Title Guaranty Trust Company, in New York City, the National City Bank, in New York City, or the Bank of Manhattan, in Long Island, state of New York, or elsewhere, amounting to $52,000, or any sum, or the promissory notes of J. S. Cosden, H. D. Brownlee, or W. B. Miller, in the principal sum of $19,700.00 or any sum, except the note of H. D. Brownless in the principal sum of $4,400.00, which was; and is, entirely worthless, or that any of the said alleged notes had a fair cash value of $19,700, or any sum, or that at all, or any of such property alleged to have been owned by John E. Madden, deceased, had a fair cash value of $466,700.00 or any sum; and denies that on July 1st, 1925, John E. Madden, deceased, was the owner of 2,540, or any shares of the capital stock of Corn Products Refining Company, or 33, or any shares of the capital stock of Bush Terminal Company, or 333, or any shares of the [fol. 13] capital stock of United States Steel Corporation, or 66, or any shares of the capital stock of American Steel Foundry Company, or 500, or any shares of the capital stock of Standard Oil Company of New Jersey, or 66, or any shares of the capital stock of Anaconda Copper Company, or 33, or any shares of the capital stock of Murray Corporation of America, or 33, or any shares of the capital stock of Columbia Gas and Electric Corporation, or 366, or any shares of the capital stock of Union Carbide and Carbon Company, or 33, or any shares of the capital stock of Bendix Aviation Corporation, or 340, or any shares of the capital stock of Commercial Solvents Corporation, or that all, or any, of said shares of capital stock had a fair cash value of $398,000.00 or any sum, or money on deposit in the Title Guaranty Trust Company, in New York City, the National City Bank in New York City, or the Bank of Manhattan, in Long Island, State of New York, amounting to $50,000.00, or any sum, or promissory notes of J. S. Cosden, H. L. Brownless, or W. B. Miller, in the principal sum of $19,700.00, or any sum or that he had the notes of any such per-

sons, except that of J. S. Cosden in the principal sum of $4,400.00 or that all, or any of such notes had a fair cash value of $467,700.00 or any sum; denies that on July 1st, 1926, John E. Madden, deceased was the owner of 2,540 or any shares of the capital stock of Corn Products Refining Company, or 33, or any shares of the capital stock of Bush Terminal Company, or 333 or any shares of the capital stock of United States Steel Corporation, or 66, or any shares of the capital stock of American Steel Foundry Company, or 500, or any shares of the capital stock of Standard Oil Company of New Jersey, or 66, or any shares of the capital stock of Anaconda Copper Company, or 33, or any shares of the capital stock of Murray Corporation of America or 33, or any shares of the capital stock of Columbia Gas and Electric [fol. 14] Corporation, or 366, or any shares of the capital stock of Union Carbide and Carbon Company, or 33, or any shares of the capital stock of Bendix Aviation Corporation, or 340, or any shares of the capital stock of Commercial Solvents Corporation, or that all of said shares of capital stock had a fair cash valuation of $390,000.00, or any sum, on said date, or money on deposit in the Title Guaranty Trust Company, of New York City, the National City Bank, in New York City, or the Bank of Manhattan, in Long Island, State of New York, amounting to $45,000.00, or any sum, or the promissory notes of J. S. Cosden, H. L. Brownlee, or W. B. Miller, in the principal sum of $19,700.00 or any sum, except the note of J. S. Cosden in the principal sum of $4,400.00, or that said alleged notes, or any of them had a fair cash value $19,700.00, or any sum, or that all of said property was of the fair cash value of $454,700.00 or any sum; denies that on July 1st, 1927, John E. Madden, deceased, was the owner of 2,540, or any shares of the capital stock of Corn Products Refining Company, or 33, or any shares of the capital stock of Bush Terminal Company, or 333, or any shares of the capital stock of United States Steel Corporation, or 66, or any shares of the capital stock of American Steel Foundry Company, or 500, or any shares of the capital stock of Standard Oil Company of New Jersey, or 66, or any shares of the capital stock of Anaconda Copper Company, or 33, or any shares of the capital stock of Murray Corporation of America, or 33, or any shares of the capital stock of Columbia Gas and Electric Corporation, or 366, or any shares of the capital stock of Union Carbide and Carbon Company, or 33, or any shares of the capital stock of Bendix Aviation Corpora-

tion, or 340, or any shares of the capital stock of Commercial Solvents Corporation, or that any, or all, of said shares of capital stock has a fair cash value of $407,000.00 or any sum, on said date, or money on deposit in the Title Guaranty Trust Company in New York City, the National City Bank, in the [fol. 15] New York City, or the Bank of Manhattan, in Long Island, State of New York, amounting to $60,000.00, or any sum, or the promissory notes of J. S. Cosden, H. L. Brownless, or W. B. Miller, in the principal sum of $19,700.00 or any sum, except the note of J. S. Cosden, in the principal sum of $4,400.00, or that the said notes, or any of them, had a fair cash value of $19,700.00, or any sum whatsoever, or that all, or any of said property was of the fair cash value of $486,700.00, or any sum; or that John E. Madden, deceased, was the owner, on July 1st, 1928, of 2,540, or any shares of the capital stock of Corn Products Refining Company, or 33, or any shares of the capital stock of Bush Terminal Company, or 333, or any shares of the capital stock of United States Steel Corporation, or 66, or any shares of the capital stock of American Steel Foundry Company, or 500, or any shares of the capital stock of Standard Oil Company of New Jersey, or 66, or any shares of the capital stock of Anaconda Copper Company, or 33, or any shares of the capital stock of Murray Corporation of America, or 33, or any shares of the capital stock of Columbia Gas and Electric Corporation, or 366, or any shares of the capital stock of Union Carbide and Carbon Company, or 33, or any shares of the capital stock of Bendix Aviation Corporation, or 340, or any shares of the capital stock of Commercial Solvents Corporation or that all or any of said shares of capital stock had a fair cash value of $405,000.00, or any sum, on said date, or money on deposit in the Title Guaranty Trust Company, in New York City, the National City Bank, in New York City, or the Bank of Manhattan in Long Island, State of New York, amounting to $55,000.00, or any sum, or promissory notes of J. S. Cosden, H. L. Brownless, or W. B. Miller, in the principal sum of $18,700.00 or any sum, except the note of J. S. Cosden, in the principal sum of $4,400.00, or that the said, [fol. 16] or any notes, had a fair cash value of $19,700.00 or any sum, or that all, or any of said property had a fair cash vaine of $479,700.00, or any sum; and denies that John E. Madden, deceased, was the owner on July 1st, 1929, of 2,540, or any shares of the capital stock of Corn Products

Refining Company, or 33, or any shares of the capital stock of Bush Terminal Company, or 333, or any shares of the capital stock of United States Steel Corporation, or 66, or any shares of the capital stock of American Steel Foundry Company, or 500, or any shares of the capital stock of Standard Oil Company of New Jersey, or 66, or any shares of the capital stock of the Anaconda Copper Company, or 33, or any shares of the capital stock of Murry Corporation of America, or 33, or any shares of the capital stock of Columbia Gas and Electric Corporation, or 366, or any shares of the capital stock of Union Carbide and Carbon Company, or 33, or any shares of the capital stock of Bendix Aviation Corporation, or 340, or any shares of the capital stock of Commercial Solvents Corporation, or that all, or any of said shares of capital stock had a fair cash value of $407,000.00, or any sum, on said date, or money on deposit in the Title Guaranty Trust Company, in New York City, the National City Bank, in *the* New York City, or the Bank of Manhattan, in Long Island, State of New York, amounting to $55,000.00, or any sum or the promissory notes of J. S. Cosden, Mrs. P. *I.* Flaherty, H. L. Brownless, or W. B. Miller, in the principal sum of $21,200.00 or any sum, except the note of J. S. Cosden in the principal sum of $4,400.00 and the H. L. Brownlee note in the principal sum of $4,300.00 or that all, or any of such notes had a fair cash value of $21,200.00 or any sum, or that all or any of such property was of the fair cash value of $483,200.00, or any sum; and denies that on July 1st, 1930, the estate of John E. Madden, deceased, was the owner of any of the property referred to in the petition in Fayette [fol. 17] County, Kentucky, or elsewhere, or that John E. Madden, Jr., or Joseph M. Madden, Executors of said estate, were in possession of any such property or that such property, or any part thereof, was being administered by said Executors in Fayette County, Kentucky, or elsewhere, or that the said estate was the owner of 2,540, or any shares of the capital stock of Corn Products Refining Company, or 33, or any shares of the capital stock of Bush Terminal Company, or 333, or any shares of the capital stock of United States Steel Corporation, or 66, or any shares of the capital stock of American Steel Foundry Company, or 500, or any shares of the capital stock of Standard Oil Company of New Jersey, or 66, or any shares of the capital stock of Anaconda Copper Company, or 33, or any shares

of the capital stock of Murray Corporation of America, or 33, or any shares of the Capital stock of Columbia Gas and Electric Corporation, or 366, or any shares of the capital stock of Union Carbide and Carbon Company, or 33, or any shares of the capital stock of Bendix Aviation Corporation, or 340, or any shares of the capital stock of Commercial Solvents Corporation, or that all, or any of said shares of capital stock has a fair cash value of $405,000, or any sum, on said date or money on deposit in the Title Guaranty Trust Company, in New York City, the National City Bank, in New York City, or the Bank of Manhattan, in Long Island, State of New York, amounting to $47,000.00 or any sum, or the promissory notes of J. S. Cosden, Mrs. P. P. Flaherty, H. L. Brownlee or W. B. Miller, in the principal sum of $21,200.00 or any sum, except the note of J. S. Cosden, in the principal sum of $4,300.00 or that all, or any of such notes had a fair cash value of $21,200.00 or any sum, or that all, or any, of said property was of the fair cash value of $473,200.00, or any sum, or that all, or any, of such property was wholly or at all, omitted from assessment for taxation for such purposes, with the assessor of [fol. 18] Fayette County, Kentucky, or with any other assessing officer or assessing board of said county, or of the State of Kentucky, on each or any of the dates referred to in the petition, or that any of the taxes thereon are now delinquent.

Wherefore, the defendant, John E. Madden, Jr., Executor of the estate of John E. Madden, deceased, prays that the statement herein be dismissed; for his costs herein expended, and for all proper relief.

Wm. Marshall Bullitt, Bruce and Bullitt, Counsel for Defendant.

[File endorsement omitted.]

[fol. 19] In County Court of Fayette County

Amended Answer—Filed Feb. 25, 1933

The defendant, John E. Madden, Executor of the Estate of John E. Madden, deceased, (hereinafter called the Executor) hereby amended Paragraph II of his answer herein, so that as a whole it shall read as follows, to-wit:

The executor does not have sufficient knowledge or information to form a belief whether the statement herein was approved by the State Tax Commission of the State of Kentucky, before being filed, or at any time. The Executor denies that on each or any of the assessing dates of July 1st, in each or any, of the years of 1924, 1925, 1926, 1927, 1928, or 1929, the said John E. Madden, deceased, was the owner of the personal property set out in the statement herein; and that denies that on July 1st, 1924, he was the owner of 2,540 or any, shares of the capital stock of Corn Products Company, or 33, or any shares of the capital stock of Bush Terminal Company, or 333, or any shares of the capital stock of the United States Steel Corporation, or 66, or any shares of the capital stock of American Steel Foundry Company, or 500, or any shares of the capital stock of the Standard Oil Company of New Jersey, or 66, or any shares of the capital stock of Anaconda Copper Company, or 33, or any shares of the capital stock of Murray Corporation of America, or 33, or any shares of the capital stock of Columbia Gas and Electric Corporation, or 366, or any shares of the capital stock of Union Carbide and Carbon Company, or 33, or any shares of the capital stock of Bendix Corporation, or 340, or any shares of the capital stock of Commercial Solvents Corporation. The Executor does not have sufficient knowledge or information to form a belief whether all, or any, of such shares of capital stock, had a fair cash value of $395,000.00, or any sum, on said date; or whether John E. Madden, deceased, had money on deposit in the Title Guarantry Trust Company, in New [fol. 20] York City, the National City Bank in New York City, the Bank of Manhattan in Long Island, State of New York or elsewhere, amounting to $52,000.00, or any sum, and denies that he had or owned the promissory notes of J. S. Cosden, H. D. Brownlee, or W. B. Miller, in the principal sum of $19,700.00 or any sum, except the note of J. S. Cosden in the principal sum of $4,400.00 which was, and is, entirely worthless, or that any of the said alleged notes had a fair cash value of $19,700.00, or any sum, or that all, or any, of such property alleged to have been owned by John E. Madden, deceased, had a fair cash value of $466,700.00, or any sum; and denies that on July 1st, 1925, John E. Madden, deceased, was the owner of 2,540 or any, shares of the capital stock of Corn Products Refining Company, or 33, or any, shares of the capital stock of Bush Terminal

Company, or 333, or any, shares of the capital stock of United States Steel Corporation, or 66, or any shares of the capital stock of American Steel Foundry Company, or 500, or any, shares of the capital stock of Standard Oil Company of New Jersey, or 66, or any shares of the capital stock of Anaconda Copper Company, or 33, or any shares of the capital stock of Murray Corporation of America, or 33, or any, shares of the capital stock of Columbia Gas and Electric Corporation, or 366, or any shares of the capital stock of Union Carbide and Carbon Company, or 33, or any, shares of the capital stock of Bendix Aviation Corporation, or 340, or any, shares of the capital stock of Commercial Solvents Corporation. The Executor does not have sufficient knowledge or information to form a belief whether all, or any, of said shares of capital stock had a fair cash value of $398,000.00, or any sum, or whether John E. Madden, deceased, had money on deposit in the Title Guaranty Trust Company, in New York City, the National City Bank, in New York City, or the Bank of Manhattan, in Long Island, State of New York, amounting to $50,000.00 or any sum, and denies that he had, or owned, promissory notes [fol. 21] of J. S. Cosden, H. L. Brownlee or W. B. Miller, in the principal sum of $19,700.00, or any sum, or that he had the notes of any such persons, except that of J. S. Cosden, in the principal sum of $4,400.00 or that all, or any, of such notes had a fair cash value of $467,700.00, or any sum; denies that on July 1st, 1926, John E. Madden, deceased, was the owner of 2,540 or any, shares of the capital stock of Corn Products Refining Company, or 33, or any, shares of the capital stock of Bush Terminal Company, or 333, or any, shares of the capital stock of United States Steel Corporation, or 66, or any, shares of the capital stock of the Standard Oil Company of New Jersey, or 66, or any shares of the capital stock of Anaconda Copper Company, or 33, or any, shares of the capital stock of Murray Corporation of America, or 33, or any shares of the capital stock of Columbia Gas and Electric Corporation, or 366, or any, shares of the capital stock of Union Carbide and Carbon Company, or 33, or any, shares of the capital stock of Bendix Aviation Corporation, or 340, or any, shares of the capital stock of Commercial Solvent Corporation. The Executor does not have sufficient knowledge or information to form a belief whether all, or any, of said shares of capital stock had a fair cash value of $390,000.00 or any sum,

on said date, or whether John E. Madden, deceased, had money on deposit in the Title Guaranty Trust Company, of New York City, the National City Bank, in New York City, or the bank of Manhattan in Long Island State of New York, amounting to $45,000.00, or any sum, and denies that he had or owned the promissory notes of J. S. Cosden H. L. Brownlee, or W. B. Miller, in the principal sum of $19,700.00 or any sum, except the note of J. S. Cosden, in the principal sum of $4,400.00, or that said alleged notes, or any of them, had a fair cash value of $19,700.00 or any sum, or that all of said property was of the fair cash value of $454,700.00, or any sum; denies that on July 1st, 1927, John E. Madden, deceased was the owner of 2,540, or any [fol. 22] shares of the capital stock of Corn Products Refining Company, or 33, or any, shares of the capital stock of Bush Terminal Company, or 333, or any shares of the capital stock of United States Steel Corporation, or 66, or any, shares of the capital stock of American Steel Foundry Company, or 500, or any, shares of the capital stock of Standard Oil Company of New Jersey, or 66, or any shares of the capital stock of Anaconda Copper Company, or 33, or any, shares of the capital stock of Murray Corporation of America, or 33, or any, shares of the capital stock of Columbia Gas and Electric Corporation, or 366, or any, shares of the capital stock of Union Carbide and Carbon Company, or 33, or any, shares of the capital stock of Bendix Aviation Corporation, or 340, or any shares of the capital stock of Commercial Solvents Corporation. The executor does not have sufficient knowledge or information to form a belief whether any, or all, of said shares of capital stock had a fair cash value of $407,000.00 or any sum, or whether John E. Madden, deceased, had on said date, money on deposit in the Title Guaranty Trust Company, in New York City, the National City Bank, in New York City, or the Bank of Manhattan, in Long Island, State of New York, amounting to $60,000, or any sum, and denies that he had or owned the promissory notes of J. S. Cosden, H. L. Brownlee or W. B. Miller, in the principal sum of $19,700.00 or any sum, except the note of J. S. Cosden in the principal sum of $4,400, or that the said notes, or any of them had a fair cash value of $19,700.00 or any sum whatsoever, or that all, or any of said property was of the fair cash value of $486,700.00 or any sum, or that John E. Madden, deceased, was the owner on July 1st, 1928, or 2,540 or any shares of

the capital stock of Corn Products Refining Company, or 33, or any, shares of the capital stock of Bush Terminal [fol. 23] Company, or 333, or any, shares of the capital stock of United States Steel Corporation, or 66, or any, shares of the capital stock of American Steel Foundry Company, or 500, or any, shares of the capital stock of Standard Oil Company of New Jersey, or 66, or any shares of the capital stock of Anaconda Copper Company, or 33, or any, shares of the capital stock of Murray Corporation of America, or 33, or any, shares of the capital stock of Columbia Gas and Electric Corporation, or 366, or any, shares of the capital stock of Union Carbide and Carbon Company, or 33, or any, shares of the capital stock of Bendix Aviation Corporation, or 340, or any shares of the capital stock of Commercial Solvents Corporation.

The Executor does not have sufficient knowledge or information to form a belief whether all, or any, of said shares of capital stock had a fair cash value of $405,000.00, or any sum, on said date, or whether John E. Madden, deceased, had money on deposit in the Title Guaranty Trust Company, in New York City, the National City Bank, in New York City, or the Bank of Manhattan, in Long Island, State of New York, amounting to $55,000.00, or any sum, and denies that he had or owned promissory notes of J. S. Cosden, H. L. Brownlee or W. B. Miller, in the principal sum of $19,700.00, or any sum, except the note of J. S. Cosden in the principal sum of $4,400.00, or that the said, or any notes, had a fair cash value of $19,700.00, or any sum, or that all, or any of said property had a fair cash value of $479,700.00, or any sum; and the Executor does not have sufficient knowledge or information to form a belief whether John E. Mad- [fol. 24] den, deceased, was the owner on July 1st., 1929, or 2,540, or any, shares of the capital stock of Corn Products Refining Company, or 33, or any, shares of the capital stock of Bush Terminal Company, or 333, or any, shares of the capital stock of United States Steel Corporation, or 66, or any, shares of the capital stock of American Steel Foundry Company, or 500, or any, shares of the capital stock of Standard Oil Company of New Jersey, or 66, or any, shares of the capital stock of the Anaconda Copper Company, or 33, or any, shares of the capital stock of Murray Corporation of America, or 33, or any, shares of the capital stock of Columbia Gas and Electric Corporation, or 366, or any, shares of the capital stock of Union Carbide and Car-

bon Company, or 33, or any, shares of the capital stock of Bendix Aviation Corporation, or 340, or any, shares of the capital stock of Commercial Solvents Corporation, or whether all, or any, of said shares of capital stock had a fair cash value of $407,000.00, or any sum, on said date, or whether he had money on deposit in the Title Guaranty Trust Company, in New York City, the National City Bank, in New York City, or the Bank of Manhattan, in Long Island, State of New York, amounting to $55,000.00, or any sum, and denies that he had or owned the promissory notes of J. S. Cosden, Mrs. P. P. Flaherty, H. L. Brownlee or W. B. Miller, in the principal sum of $21,200.00, or any sum, except the note of J. S. Cosden in the principal sum of $4,400.00, and the Mrs. P. P. Flaherty note in the principal sum of $1,500.00, and the note of W. B. Miller in the principal sum of $11,000.00, or that all, or any, of such notes had a fair cash value of $21,200.00, or any sum in excess of $11,000 or that all, or any, of such property was of the fair cash value of $483,200.00, or any sum in excess of [fol. 25] $11,000.00; and denies that on July 1st, 1930, the estate of John E. Madden, deceased, was the owner of any of the property referred to in the petition in Fayette County, Kentucky, or elsewhere, except the said Cosden note and Flaherty note, which were worthless, or that John E. Madden, Jr., or Joseph M. Madden, Executors of said estate were in possession of any of such property, except such Cosden and Flaherty notes, or that such property, or any part thereof, except such notes, was being administered by said Executors in Fayette County, Kentucky, or elsewhere, or that the said — was the owner of 2,540, or any, shares of the capital stock of Corn Products Refining Company, or 33, or any, shares of the capital stock of Bush Terminal Company, or 333, or any shares of the capital stock of United States Steel Corporation, or 66, or any, shares of the capital stock of American Steel Foundry Company, or 500, or any shares of the capital stock of Standard Oil Company of New Jersey, or 66, or any shares of the capital stock of Anaconda Copper Company, or 33, or any, shares of the capital stock of Murray Corporation of America, or 33, or any, shares of the capital stock of Columbia Gas and Electric Corporation, or 366, or any, shares of the capital stock of Union Carbide and Carbon Company, or 33, or any, shares of the capital stock of Bendix Aviation Corporation,

or 340, or any, shares of the capital stock of Commercial Solvents Corporation, or that all, or any, of said shares of capital stock had a fair cash value of $405,000.00, or any sum, on said date, or money on deposit in the Title Guaranty Company, in New York City, the National City Bank, in New York City, or the Bank of Manhattan, in Long Island, State of New York, amounting to $47,000.00, or any sum, or the promissory notes of J. S. Cosden, Mrs. P. P. Flaherty, [fol. 26] H. L. Brownlee or W. B. Miller, in the principal sum of $21,200.00, or any sum, except the note of J. S. Cosden, in the principal sum of $4,400.00, and the note of H. L. Brownlee, in the principal sum of $4,300.00, and the note of Mrs. P. P. Flaherty, in the principal sum of $1,500.00, or that all, or any, of such notes had a fair cash value of $21,200.00, or any sum, or that all, or any, of said property was of the fair cash value of $473,200.00, or any sum, or that all, or any, of such property was wholly, or at all, omitted from assessment for taxation for such purposes, with the Assessor of Fayette County, Kentucky, or with any other assessing officer of Assessing Board of said County, or of the State of Kentucky, on each or any of the dates referred to in the petition, or that any of the taxes thereon are now delinquent, except as to the said $11,000.00 W. B. Miller note for the year 1929.

Wherefore, the defendant, John E. Madden, Jr., Executor of the estate of John E. Madden, deceased, prays that the statement herein be dismissed; for his costs herein expended, and for all proper relief.

Burns Bullitt, Counsel for Defendant.

Duly sworn to by John E. Madden, Jr. Jurat omitted in printing.

[fol. 27] [File endorsement omitted.]

[fol. 28] In County Court of Fayette County

Plaintiff's Second Amended Statement—Filed Oct. 3, 1933

Comes the plaintiff, Commonwealth of Kentucky, by M. J. Brennan, Revenue Agent for the State at Large, and amends its statement and for amendment alleges that John E. Madden, Sr., on July 1st, 1927, was the owner of the following credit, to-wit:

A debt in the principal sum of $70,680.94, which sum was owing by Harriman and Company, of the City of New York, state of New York, to said John E. Madden, Sr., on said date, and the said credit, on said date, was of the fair cash value of $70,680.94; and that John E. Madden, Sr., on July 1st, 1929, was the owner of the following credit, to-wit:

A debt in the principal sum of $305,358.39, which sum was owing by Harriman and Company, of the City of New York, state of New York, to said John E. Madden, Sr., on said date, and the said credit, on said date, was of the fair cash value of $305,358.39; all of which property was wholly omitted from assessment for taxation for state purposes with the assessor of Fayette County, Kentucky, or any other assessing officer or assessing board of said county of the State of Kentucky, on each of the dates aforesaid, and that the tax thereon is now delinquent.

Wherefore, plaintiff prays judgment as in its statement and amended statement heretofore filed herein, and prays further that the property herein described be assessed against the defendant, John E. Madden, Jr., as Executor of the estate of John E. Madden, deceased, as of each of the dates aforesaid, at the respective valuations named, [fol. 29] and that he be adjudged liable to the Commonwealth of Kentucky for the tax on said property for the years of 1928 and 1930, together with the statutory penalty of 100% due the state of Kentucky, for both of said years, and 6% interest on each year's taxes from the date they should have been paid, and also 20% penalty due the Revenue Agent on the total amount of said tax. Plaintiff prays for its costs herein expended and for all further and proper relief.

Commonwealth of Kentucky, by M. J. Brennan, Revenue Agent for the State at Large.

Harry D. Kremer, Attorney for aPlaintiff.

[File endorsement omitted.]

[fol. 30] In County Court of Fayette County

Third Amended Statement—Filed Nov. 2, 1933

The plaintiff, Commonwealth of Kentucky, by M. J. Brennan, duly appointed, qualified and acting Revenue Agent

for the State at Large, states that the Statement in this action, before being filed, was approved by the State Tax Commission of the State of Kentucky, and that John E. Madden was a resident of Fayette county, Kentucky, on the 1st day of July, 1924, and continuously thereafter until the date of his death on November —, 1929; that John E. Madden died on the * * * day of November, 1929, a resident of Fayette County, Kentucky, and that his Will was duly and regularly offered for probate in the County Court of Fayette County, Kentucky, on January 10th, 1930, and it was then and there duly proved and admitted to probate in said Court, by order of said Court, and that, by the terms of said Will, John E. Madden, Jr., and Joseph M. Madden were nominated and designated as the Executors of the last Will and Testament of John E. Madden, deceased, and that on said January 10th, 1930, the said John E. Madden, Jr., accepted, in said Court, to serve as one of the Executors of the last Will and Testament of said John E. Madden, deceased, and he then and there duly qualified and gave bond as such Executor, in said Court, and on January 21, 1930, the said Joseph M. Madden accepted, in said Court, to serve as one of the Executors of the last Will and Testament of said John E. Madden, deceased, and he then and there duly qualified and gave bond as such Executor, in said Court, and that Joseph M. Madden died on October 31st, 1932, and therefore, is not now, nor has been since said date, a joint Executor of the estate of John E. Madden, deceased, and that John E. Madden, Jr., since said death of Joseph M. Madden, has been the sole Executor of the estate of John E. Madden, deceased, [fol. 31] since October 31st, 1932, and that he is such at the present time and has been a resident of Fayette County, Kentucky, ever since the date of his said appointment; that on each of the assessing dates of July 1st, in the years of 1924, 1925, 1926, 1927, 1928 and 1929, the said John E. Madden, now deceased, was the owner of personal property as follows, to-wit:

On July 1st, 1924, 2,000 common shares of the capital stock of the United States Steel Corporation, having the fair cash value of $200,000.00, 11,000 common shares of the capital stock of the Corn Products Refining Company, having the fair cash value of $385,000.00, also a credit consisting of a debt of $100.00 owing to John E. Madden, sr., on July 1st, 1924, by the Title Guarantee and Trust Company,

which debt was represented by a bank deposit of John E. Madden, Sr., on said date in said bank, which bank was then and there located in the City of New York, State of New York, which credit and bank deposit was of the fair cash value of $100.00 on said date, also a credit consisting of a debt of $63,800.00 owing to John E. Madden, Sr., on July 1st, 1924, by the National City Bank of New York, which debt was represented by a bank deposit of John E. Madden, Sr., on said date in said bank, which bank was then and there located in the city of New York, State of New York, which credit and bank deposit was of the fair cash value of $63,800.00 on said date, and all of said property, owned as aforesaid on July 1st, 1924, by John E. Madden, Sr., being of the fair cash value of $648,900.00 on said date.

On July 1st, 1925, a credit consisting of a debt of $56,100.00 owing to John E. Madden, Sr., on July 1st, 1925, by the Title Guarantee and Trust Company, which debt was represented by a bank deposit of John E. Madden, Sr., on said date in said bank, which bank was [fol. 32] then and there located in the City of New York, State of New York, which credit and bank deposit was of the fair cash value of $56,100.00 on said date, and all of said property, owned as aforesaid on July 1st, 1925 by John E. Madden, Sr., being of the fair cash value of $56,100.00 on said date.

On July 1st, 1926, a credit consisting of a debt of $7,200.00 owing to John E. Madden, Sr., on July 1st, 1925, by the Bank of Manhattan Company, which debt was represented by a bank deposit of John E. Madden, Sr., on said date in said bank, which bank was then and there located in the Village of Queens, State of New York, which credit and bank deposit was of the fair cash value of $7,200.00 on said date, also a credit consisting of a debt of $43,700.00 owing to John E. Madden, Sr., on July 1st, 1926, by the Title Guarantee and Trust Company, which debt was represented by a bank deposit of John E. Madden, Sr., on said date in said bank, which bank was then and there located in the City of New York, State of New York, which credit and bank deposit was of the fair cash value of $43,700.00 on said date, also a credit consisting of a debt of $49,000.00 owing to John E. Madden, Sr., on July 1st, 1926, by the National City Bank of New York, which debt was represented by a bank deposit of John E. Madden, Sr., on said date in said bank, which bank was then and there located in the city of New York, State of New York,

which credit and bank deposit was of the fair cash value of $49,000.00 on said date, and all of said property, owned as aforesaid on July 1st, 1926 by John E. Madden, Sr., being of the fair cash value of $99,900.00;

On July 1st, 1927, 700 common shares of the capital stock of the Corn Products Refining Company, having the fair [fol. 33] cash value of $37,100.00, also a credit consisting of a debt of $70,600.00 owing to John E. Madden, Sr., on July 1st, 1927, by Harriman and Company, of New York City, New York, which debt was represented on said date, by a credit balance owing to John E. Madden, Sr., by said Harriman and Company, brokers in the City of New York, which credit was of the fair cash value of $70,600.00 on said date, also a credit consisting of a debt of $2,800.00 owing to John E. Madden, Sr., on July 1st, 1927, by the Title Guarantee and Trust Company, which debt was represented by a bank deposit of John E. Madden, Sr., on said date in said bank, which bank was then and there located in the city of New York, State of New York, which credit and bank deposit was of the fair cash value of $2,800.00 on said date, also a credit consisting of a debt of $56,100.00 owing to John E. Madden, Sr., on July 1st, 1927, by the National City Bank of New York, which debt was represented by a bank deposit of John E. Madden, Sr., on said date in said bank, which bank was then and there located in the City of New York, State of New York, which credit and bank deposit was of the fair cash value of $56,100.00, and all of said property, owned as aforesaid on July 1st, 1927 by John E. Madden, Sr., being of the fair cash value of $166,600.00;

On July 1st, 1928, 5,400 common shares of the capital stock of Corn Products Refining Company, having the fair cash value of $388,800.00, 300 common shares of the capital stock of the B. F. Goodrich Company, having the fair cash value of $21,000, 200 "A" shares of the capital stock of Porto Rico American Tobacco Company, having the fair cash value of $10,800.00, 100 "B" shares of the capital stock of Porto Rico American Tob-cco Company, having the fair [fol. 34] cash value of $2,300.00, 100 common shares of the capital stock of the Texas Gulf Sulphur Company, having the fair cash value of $6,600.00, 400 common shares of the capital stock of Granby Consolidated Mining Smelting and Power Company, having the fair cash value of $21,200.00, 100 common shares of the capital stock of Union Carbide and Carbon Corporation, having the fair cash value of $14,700.00, 200 common "B" shares of the capital stock of

the R. J. Reynolds Tobacco Company, having the fair cash value of $26,200.00, also a credit consisting of a debt of $34,400.00 owing to John E. Madden, Sr., on July 1st, 1928 by the Title Guarantee and Trust Company, which debt was represented by a bank deposit of John E. Madden, Sr., on said date in said bank, which bank was then and there located in the City of New York, State of New York, which credit and bank deposit was of the fair cash value of $34,400.00 on said date, also a credit consisting of a debt of $5,600.00 owing to John E. Madden, Sr., on July 1st, 1928, by the National City Bank of New York, which debt was represented by a bank deposit of John E. Madden, Sr., on said date in said bank, which bank was then and there located in the City of New York, State of New York, which credit and bank deposit was of the fair cash value of $5,600.00, and all of said property, owned as aforesaid on July 1st, 1928, by John E. Madden, Sr., being of the fair cash value of $531,600.00 on said date;

On July 1st, 1929, 200 common shares of the capital stock of the Anaconda Copper Mining Company, having the fair cash value of $23,800.00, 640 common shares of the capital stock of the Corn Products Refining Company, having the fair cash value of $63,300.00, 100 common shares of the capital stock of the Fleischmann Company, having the fair cash value of $8,300, 100% preferred shares of the capital stock of Bush Terminal Company, having the fair cash [fol. 35] value of $11,300.00, also a credit consisting of a debt of $305,300.00 owing to John E. Madden, Sr., on July 1st, 1929, by Harriman and Company of New York City, New York, which debt was represented, on said date, by a credit balance owing to John E. Madden, Sr., by said Harriman and Company, brokers in the City of New York, which credit was of the fair cash value of $305,300.00 on said date, also a credit consisting of a debt of $26,000.00 owing to John E. Madden, Sr., on July 1st, 1929, by the Bank of the Manhattan Company, which debt was represented by a bank deposit of John E. Madden, Sr., on said date in said Bank, which bank was then and there located in the Village of Queens, State of New York, which credit and bank deposit was of the fair cash value of $26,000.00 on said date, also a credit consisting of a debt of $10,900.00 owing to John E. Madden, Sr., on July 1st, 1929, by the Title Guaranty and Trust Company, which debt was represented by a bank deposit of John E. Madden, Sr., on said date in said bank, which bank was then and there located in the City of New

York, State of New York, which credit and bank deposit was of the fair cash value of $10,900.00 on said date, also a credit consisting of a debt of $21,200.00 owing to John E. Madden, Sr., on July 1st, 1929, by the National City Bank of New York, which debt was represented by a bank deposit of John E. Madden, Sr., on said date in the said bank, which was then and there located in the city of New York, State of New York, which credit and bank deposit was of the fair cash value of $21,200.00 on said date, also a promissory note of Mrs. P. P. Flaherty in the principal sum and of the fair cash value of $1,500.00, and also a promissory note of W. B. Miller in the principal sum of and of the fair cash value of $11,000.00, and all of said property, owned as aforesaid on July 1st, 1929 by John E. Madden, Sr., being of the fair cash value of $482,600.00; all of which property was [fol. 36] wholly omitted from assessment for taxation for state purposes with the Assessor of Fayette County, Kentucky, or any other assessing officer or assessing board of said county or of the State of Kentucky, on each of the dates aforesaid, and that the tax thereon is now delinquent.

WHEREFORE, plaintiff prays judgment that said property be assessed against the defendant herein, John E. Madden, Jr., as Executor of the Estate of John E. Madden, deceased, as of each of the dates aforesaid, at the respective valuations named, and that he be adjudged liable to the Commonwealth of Kentucky for the tax on said property for the years of 1925, 1926, 1927, 1928, 1929 and 1930, together with the statutory penalty of 100% due the State of Kentucky for all of said years, and 6% interest on each year's taxes from the date they should have been paid and also 20% penalty due the Revenue Agent on the total amount of said tax. Plaintiff prays for its costs herein expended and for all further and proper relief.

Harry D. Kremer, Attorney for Plaintiff.

[File endorsement omitted.]

[fol. 37] IN COUNTY COURT OF FAYETTE COUNTY

AMENDED ANSWER AND ANSWER TO SECOND AMENDED STATEMENT AND THIRD AMENDED STATEMENT—Filed November 21, 1933

The defendant, John E. Madden, Jr., Executor of the Estate of John E. Madden, deceased, for amendment to his

answer herein and for answer to the second amended statement and the third amended statement herein, states as follows, to-wit:

Paragraph One

The defendant denies that John E. Madden, Sr. on July 1st, 1927, or at any time was the owner of a debt in the principal sum of $70,680.94, or any sum in excess of $23,560.31, owing by Harriman and Company of the City of New York, State of New York to the said John E. Madden Sr., or that said credit on said date or at any time was of the fair cash value of $70,680.94, or any sum in excess of $23,560.31; or that John E. Madden, Sr., on July 1st, 1929, or at any time was the owner of a debt in the principal sum of $305,358.39, or any sum in excess of $101,786.13 or that any sum in excess of $101,786.13 was owing by Harriman and Company of the city of New York, State of New York, to said John E. Madden, Sr., on said or any date, or that such alleged credit on said or any date was of the fair cash value of $305,358.39 or any sum in excess of $101,786.13, or that any of such property was wholly or at all omitted from assessment for taxation for State purposes with the Assessor of Fayette county, Kentucky, or any other assessing officer or assessing board of said county or of the State of Kentucky on each or any date, or that any tax thereon is now due or delinquent.

Paragraph Two

[fol. 38] The defendant denies that on July 1st, 1924, John E. Madden, Sr. was the owner of 2,000 or any shares of the common capital stock of the United States Steel Corporation having a fair value of $200,000,00, or any sum. The said John E. Madden, Sr. had on July 1st, 1924, a one-third interest in a brokerage account with Livingston and Company, 111 Broadway, New York, New York, in which account Livingston and Company held in its name 2,000 shares of the common capital stock of United States Steel Corporation of the value of approximately $200,000.00, but there was a debit balance in the said account of $355,226.32, one-third of which was owing to Livingston and Company by John E. Madden, Sr. The said brokerage account represented not an asset of John E. Madden, Sr. but a liability of John E. Madder, Sr. to Livingston and Company in the sum of $111,742.11, less $66,666.67, which is the value of the one-

third of the said 2,000 shares of the common capital stock of the United States Steel Corporation, leaving a net liability of John E. Madden, Sr. to Livingston and Company on July 1st, 1925, of $45,075.44. 666 shares of the common stock of United States Steel Corporation were listed by John E. Madden for taxation in Fayette county, Kentucky, on July 1st, 1924. The defendant denies that on July 1st, 1924, John E. Madden, Sr. was the owner of 11,000 or any amount in excess of 8,333.34/100 shares of the capital stock of Corn Products Refining Company, or that said stock had a fair cash value of $385,000.00 or any sum in excess of $291,666.00, and all of the said common capital stock of Corn Products Refining Company was listed by John E. Madden, for assessment in Fayette County, Kentucky on July 1st, 1924, and the said 11,000 shares of the common capital stock of Corn Products Refining Company, a one-third interest of which was owned by John E. Madden, Sr. was pledged as security with Livingston and Company to secure the said debit balance (in excess of the value of the United States [fol. 39] Steel Corporation stock in such brokerage account) as aforesaid; and the said defendant denies that the said property owned on July 1st, 1924, by John E. Madden, Sr. was of the fair cash value of $648,900.00 or any sum in excess of $63,900.00 represented by deposits in bank, and the further sum of the value of 8,333.34./100 shares of common capital stock of Corn Products Refining Company, which was listed for taxation on said date in Fayette County, Kentucky.

The defendant denies that on July 1st, 1927, John E. Madden, Sr. was the owner of 700 shares of the common capital stock of Corn Products Refining Company, or any amount in excess of a one-third interest in 700 shares of such stock which stood in the name of Harriman and Company, brokers of New York, New York, and 8,333.34/100 shares of such stock which was listed on such date by John E. Madden, Sr. for taxation in Fayette County, Kentucky; and denies that the interest of John E. Madden Sr. in the said 700 shares of such stock was of the fair cash value of $37,000.00 or any sum in excess of $12,366.69; and denies that on said date John E. Madden, Sr. was the owner of a credit consisting of a debt of $70,600.00 or any sum in excess of a one-third interest therein owing to John E. Madden Sr., on July 1st, 1927, by Harriman and Company of New York,

New York, or that such credit was of the fair cash value of $70,600.00 or any sum in excess of $23,533.33 on said date; and denies that the said property owned on July 1st, 1927, by John E. Madden, Sr. was of the fair value of $166,600.00 or any sum in excess of $23,533.33 representing a credit balance with brokers in the City of New York and $12,366.67, representing a one-third interest in 700 shares of Corn Products Refining Company common capital stock, and said [fol. 40] cash and stock in a brokerage account at Harriman and Company and $58,900, representing moneys on deposit with the Title Guarantee and Trust Company National City Bank, both of New York City.

The defendant denies that on July 1st, 1928, John E. Madden Sr. was the owner of 5,400 or any common shares of the capital stock of Corn Products Refining Company (except as hereinafter stated) having a fair cash value of $388,800.00 or any shares of the common capital stock of Corn Products Refining Company except 8,334 shares thereof which were listed by him for taxation in Fayette County, Kentucky on said date, or 300 or any common shares of the capital stock of the B. F. Goodrich Company, having a fair cash value of $21,000.00 or any sum, or any "A" shares of the capital stock of Porto Rico American Tobacco Company, having a fair cash value of $10,800.00 or any sum or 100 or any of "B" shares of the capital stock of Porto Rico American Tobacco Company, having a fair cash value of $2,300.00 or any sum or 100 or any common shares of the capital stock of the Texas Gulf Sulphur Company, having the fair cash value of $6,600.00, or any sum, or 400 or any common shares of the capital stock of Gransby Consolidated Mining Smelting and Power Company, having the fair cash value of $21,200.00 or any sum or 100 of any shares of the common capital stock of Union Carbide and Carbon Corporation, having the fair cash value of $14,700.00 or any sum or 200 or any common "B" shares of the capital stock of R. J. Reynolds Tobacco Company, having the fair cash value of $26,200.00 or any sum.

On July 1st, 1928, John E. Madden, Sr. was the owner of a one-third interest in a brokerage account with Harriman and Company and in a brokerage account with Tucker-Anthony and Company, stock brokers in the City of New York, New York., In the said account with Harriman and Company, John E. Madden, Sr. was on July 1st, 1928, the

[fol. 41] owner of a one-third interest in the following shares of stock, to-wit:

100 shares Texas Gulf Sulphur Company,
200 shares Porto Rico American Tobacco "A",
100 shares Porto Rico American Tobacco "B",
100 shares Goodrich Rubber Company,
400 shares Granby Consolidated Mining Company,
100 shares Union Carbide and Carbon Company,
200 shares R. J. Reynolds Tobacco "B",
3500 shares Corn Products Refining Company,

all of which stock stood in the street or brokers names and was held as a part of the said brokers' accounts and the value of the interest of John E. Madden, Sr. in such stock was at the said time $113,600.00. In such brokerage account with Harriman and Company, John E. Madden, Sr. and his partners who had interests therein, owed to Harriman and Company a net debit balance of the said account, to-wit: $183,326.81, and John E. Madden, Sr. portion of the said indebte*ndess* was $61,108.93, leaving a net equity in favor of John E. Madden Sr. in the said account of $52,491.07.

In the said account with Tucker-Anthony and Company on July 1st, 1928, John E. Madden Sr. was the owner of 1,900 shares of Corn Products Refining Company common stock and 200 shares of common stock of B. F. Goodrich Rubber Company, all of which shares of stock stood in the name of the said brokers and had a value of $150,800.00. John E. Madden, Sr. owed to Tucker-Anthony and Company the sum of $116,456.70, which was the debit balance of the said account and the net equity of his interest therein was only the sum of $34,343.21.

The defendant denies that the value of said property owed by John E. Madden Sr. on July 1st, 1928, was $521,600.00 or any sum in excess of $126,834.28, representing the net equity of such brokerage account and the sum of $40,000.00 representing the balances in accounts in banks.

[fol. 42] The defendant denies that on July 1st, 1929, John E. Madden, Sr. was the owner of 200 or any common shares of the capital stock of the Anaconda Copper Mining Company, having the fair cash value of $23,800.00 or any sum, or 640 or any common shares of the capital stock of Corn Products Refining Company, having the fair cash value of $63,300.00 or any sum (in excess of 8,334 shares which he listed for taxation on said date in Fayette County, Ken-

tucky) or 100 or any common shares of the capital stock of the Fleischmann Company, having the fair cash value of $8,300.00 or any sum, or 100 or any 7% preferred shares of the capital stock of Bush Terminal Company, having the fair cash value of $11,300.00 or any sum. The said John E. Madden, Sr., on July 1st, 1929, had a one-third interest in a brokerage account with Tucker-Anthony and Company, brokers in the City of New York, New York, in which there were the following stocks:

640 shares Corn Products Refining Company,
100 shares Bush Terminal Bldg. 7% preferred,
100 shares Anaconda Copper Mining Company,
100 shares Fleis-hmann Company,

all of which stocks had a value of $106,700.00. There was a debit balance in the said account of $40,841.46, leaving a net equity in the said brokerage account of only $65,858.54, of which John E. Madden, Sr. as the owner of a one-third interest in the said brokerage account was the owner of a net equity of $21,952.84.

The defendant denies that John E. Madden, Sr. was the owner of a credit consisting of a debt of $305,300.00 or any sum in excess of a one-third interest therein of $101,766.67, owing to John E. Madden, Sr. on July 1st, 1929, by Harriman and Company of New York, which debt was represented by a credit balance owing to the said John E. Madden, Sr. by Harriman and Company; and denies that the fair cash value on said date of the said account owing to John E. [fol. 43] Madden, Sr. was $305,300.00 or any sum in excess of $101,766.67; and denies that said property owned on July 1st, 1929 by John E. Madden Sr. was of the fair value of $482,600.00 or any sum in excess of $194,319.51 and denies that all or any of such property was wholly or at all omitted from assessment for taxation for State purposes with the Assessor of Fayette County, Kentucky, or any other assessing officer or assessing board of said county or of the State of Kentucky on each or any of the dates set out in the amended statement herein, or that any of the tax thereon is now due of delinquent.

Paragraph Three

During all of the time from July 1st, 1924, until November 3rd, 1929, at which time John E. Madden, Sr., died,

and for many years prior thereto; John E. Madden, Sr. and his *his* two sons, John E. Madden, Jr. and Joseph M. Madden (both of whom were at such times non-residents of the State of Kentucky) were engaged as partners in a very substantial business of buying and selling securities through stock brokers in New York, New York, on the New York Stock Exchange and the New York Curb Exchange in the City of New York. The said business was carried on entirely in the City of New York, New York, with stock brokers who were located in the city of New York, New York, and who were members of the New York Stock Exchange, and the New York Curb Exchange, and the funds used in the said partnership business ere kept in New York, New York, with various stock brokers therein. No part of the said partnership business was conducted or carried on in any sense within the State of Kentucky. The assets of the said partnership consisted of accounts with brokers, all of which were kept at all times in the City of New York, New York.

[fol. 44] The said business of trading upon the stock market through stock brokers, who were members of the New York Stock Exchange and the New York Curb Exchange was the business in which John E. Madden, Sr. devoted a very large portion of his time and which business was carried on by him entirely while in the City of New York, New York, and not in the State of Kentucky. The said business was extensive and involved a large capital at all times.

The said John E. Madden, Sr., John E. Madden, Jr., and Joseph M. Madden were equal partners in the said business and owned in equal shares all of the assets of the said brokerage accounts. All of the securities and accounts with brokers which are referred to in the statement herein as amended, insofar as John E. Madden, Sr. had any interest whatsoever therein, were securities registered in the brokers' names of street names as a part of the assets of the said brokerage accounts, all of which were owned by the said partnership.

The assets of the said partnership did not consist of the stocks and other securities in the said accounts, as all of such securities were kept in the brokers' names or the street names, but the said assets of such partnership consisted only in the net equity of such brokerage accounts.

Such partnership assets were a part of the said business

which was conducted entirely in the State of New York, and the assets thereof consisted of such intangible property which had a permanent situs in the state of New York and which did not at any time have a situs within the State of Kentucky in any respect whatsoever for taxation or for any other purpose. The state of Kentucky did not furnish any protection to any of the said partnership assets or in any manner have any power or control over them. If pur- [fol. 45] suant *pursuant* to Kentucky Statute 4020, or the other statutes of Kentucky relating to taxation, any tax is levied or assessed upon such assets or upon the portions thereof belong to John E. Madden, Sr. the said statutes will thereby be so construed as to render them invalid and unconstitutional and the defendant herein will be deprived of his property without due process of law and he will be deprived of the equal protection of the laws in violation of the Fourteenth Amendment to the Constitution of the United States.

Paragraph Four

By the provisions of Kentucky Statute, 4019, and 4019a, the amount of the deposits in any bank, trust company or combined bank and trust company, organized under the laws of this state, or in any national bank in this State, is assessed at the rate of one-tenth of one per cent annually upon the amount of such deposits so held by such bank on the first day of July. The plaintiff herein is attempting to assess the amount of deposits in banks and trust companies organized under the laws of the state of New York and under the laws of the United States at the rate of five-tenths of one per cent annually. No deposits in banks in Kentucky are, or have been during any of the years from 1924, to 1929, inclusive, assessed by the State of Kentucky at a rate higher than one-tenth of one per cent annually. If the said statutes and the other statutes relating to taxation upon the amount of deposits in banks are construed to require the assessment at the rate of five-tenths of one per cent upon money deposits in state and national banks outside of Kentucky, and at the rate of only one-tenth of one per cent on the amount of deposits within the State of Kentucky, such construction of the said statutes (1) will have the effect of creating an invalid and unconstitutional discrimination against deposits in state and [fol. 46] national banks outside the state of Kentucky, and will thereby deprive the defendant herein of his property

without due process of law and will deny the defendant the equal protection of the laws in violation of the Fourteenth Amendment to the Constitution of the United States, and (2) will have the effect of imposing taxes upon property of the same general class which is not uniform in violation of 171 of the Kentucky Constitution.

Paragraph Five

For many years prior to the year 1924, and at all times since, the State Tax Commission of Kentucky has construed the Kentucky Statutes with reference to the taxation of accounts with brokers as requ-ring the assessment of only the net equity in such brokerage accounts, and by uniform practice during all of such time, the State Tax Commission has enforced the assessment of only the net equity in such brokerage accounts, and the owners of accounts with brokers have returned for taxation and have paid taxes upon only the net equity owned by such customers in the said brokerage accounts, and the State Tax Commission has not attempted to enforce the said statutes as requiring the assessment of stocks and bonds in such accounts, but has assessed only the net equity thereof, and has not made any assessment upon accounts which have not shown any equity in favor of the customers. The said practice on the part of the State Tax Commission, of the tax collecting officials and all of the taxpayers in Kentucky has been uniform during all of such time and in no instance has the State Tax Commission or other taxing authorities assessed or attempted to assess the value of stocks in brokerage accounts in any manner whatsoever except to determine the net equity of such accounts and assess the [fol. 47] said equity at the rate applicable to such intangible personal property taxes.

If the defendant herein is required to assess and pay taxes upon stocks held in brokerage accounts at the value thereof, or to pay taxes on any more than the net equity in such accounts, the said defendant will thereby be deprived of its property without due process of law and will be deprived of the equal protection of the laws in violation of the Fourteenth Amendment to the Constitution of the United States, and will be denied the benefit of uniform taxation upon all proper- of the same class subject to taxation in violation of Kentucky Constitution 171.

Wherefore, the defendant, John E. Madden, Jr., Executor

of the Estate of John E. Madden, deceased, prays that the statement herein as amended be dismissed; for his costs herein expended and for all proper relief.

Bruce & Bullitt, Counsel for the Defendant.

Duly sworn to by John E. Madden, Jr., jurat omitted in printing.

[File endorsement omitted.]

[fol. 48] IN COUNTY COURT OF FAYETTE COUNTY

REPLY TO AMENDED ANSWER AND ANSWER TO SECOND AMENDED STATEMENT AND THIRD AMENDED STATEMENT—Filed Nov. 21, 1933

Comes the Plaintiff, Commonwealth of Kentucky, and for reply to paragraphs one and two of the defendant's answer and to second amended statement and third amended statement, denies that John E. Madden, Sr., on July 1st, 1924, was the owner of only a one-third interest in a brokerage account with Livingston and Company, or that he only owned a one-third interest in the said account on said date, and denies that he only owned a one-third interest in the debit balance of said account on said date, but alleges the fact to be that he was the owner of the entire account and all of the debit balance of said account on said date.

Plaintiff denies that any of the 8,334 shares of the common capital stock of the Corn Products Refining Company which were listed for taxation in Fayette County, Kentucky, as of July 1st, 1924, were any part of the 11,000 shares of the capital stock of said company which were in the brokerage account with Livingston and Company on said date.

Plaintiff denies that any of the 666 shares of the common capital stock of the United States Steel Corporation which were lists for taxation in Fayette County, Kentucky, as of July 1st, 1924, were any part of the 2,000 shares of the capital stock of said company which were in the brokerage account with Livingston and Company on said date.

Plaintiff denies that John E. Madden, Sr. was not the owner of all of said 11,000 shares of the common capital

stock of the Corn Products Refining Company, which were in the brokerage account with Livingston and Company, on July 1st, 1924, but alleges the fact to be that he was the owner of all of said 11,000 shares of stock on said date.

Plaintiff denies that John E. Madden, Sr. was not the owner of all of the 700 shares of the common stock of the [fol. 49] Corn Products Refining Company on July 1st, 1927, but alleges the fact to be that he was the owner of all of said shares of stock on said date.

Plaintiff denies that any part of said 700 shares constituted a part of the 8,334 shares of stock in said company which were listed for taxation by John E. Madden Sr., on said date, owned only a one-third interest in said 700 shares of stock, but alleges the fact to be that he owned all of said stock on said date.

Plaintiff denies that John E. Madden, Sr. was the owner of only a one-third interest in the $70,600 credit at Harriman and Company on July 1st, 1927, but alleges the fact to be that he was the owner of the entire amount of said credit.

Plaintiff denies that any cash or stock in a brokerage account with Harriman and Company or $58,900.00, represented moneys on deposit with the Title Guarantee and Trust Company and/or the National City Bank.

Plaintiff denies that any of the 5,400 shares of the capital stock of the Corn Products Refining Company were any of the shares of that company which were listed by John E. Madden, Sr. on July 1st, 1928.

Plaintiff denies that John E. Madden, Sr. was the owner of only a one-third interest in the brokerage account with Tucker, Anthony and Company, on July 1st, 1928, but alleges the fact to be that he was the owner of the entire accounts.

Plaintiff denies that John E. Madden, Sr. on July 1st, 1928, was the owner of only a one-third interest in the following shares of stock in a brokerage account with Harriman and Company, to-wit: 100 shares Texas Gulf Sulphur Company, 200 shares Porto Rico American Tobacco Company "A" 100 shares Porto Rico American Tobacco "B"; 100 shares Goodrich Rubber Company, 400 shares Granby [fol. 50] Consolidated Mining Company, 100 shares Union Carbide and Carbon Company, 200 shares R. J. Reynolds Tobacco Company "B" and 3,500 shares Corn Products Refining Company, and denies that all or any of said stocks stood in the street or broker names of said brokers, and

denies that the value of the interest of John E. Madden, Sr. in such stock on July 1st, 1928, was the only sum of $113,600.00, but alleges the fact to be that the value of his interest in said shares of stock was $340,825.00 on said date.

Plaintiff denies that John E. Madden, Sr. had any partners who had any interest in the account with Harriman and Company on said date, and denies that the proportion of the indebtedness on said account was that owing by John E. Madden Sr. was only the sum of $61,108.93, but alleges the fact to be that John E. Madden's indebtedness on said account was the sum of $183,326.81, and denies that the net equity in favor of John E. Madden, Sr. in said account was only $52,491.07 on said date, but alleges the fact to be that his equity in said account on said date was the sum of $157,498.19.

Plaintiff denies that any part of the 1900 shares of the Corn Products Refining Company common stock, or any part of the 200 shares of the B. F. Goodrich Rubber Company stock John E. Madden, Sr. owned on July 1, 1928, stood in the name of Tucker, Anthony and company on said date.

Plaintiff denies that the value of the property owned by John E. Madden, Sr. on July 1, 1928 was only the sum of $126,834.28, or that it represented a net equity in the aforesaid brokerage accounts in the sum of $40,000, or that any net equity of $40,000, or any other sum was represented on said date by balances in accounts in banks. Plaintiff alleges the fact to be that the net equity of John E. Madden, Sr. in the brokerage account with Tucker, Anthony and Company had a value of $34,343.21, on July 1, 1928, and alleges the fact to be that the net equity of John E. Madden, Sr. in [fol. 51] the brokerage account with Harriman and Company had a value of $157,498.19, on July 1, 1928.

Plaintiff denies that any of the 640 shares of stock of the Corn Products Refining Company, set out in the statement as amended herein, were any of the 8334 shares of the stock in said company which John E. Madden, Sr. listed for taxation in Fayette County, Kentucky, on July 1, 1929.

Plaintiff denies that John E. Madden, Sr. on July 1, 1929, was the owner of only a one-third interest in the brokerage account with Tucker, Anthony & Company, but alleges the fact to be that he was the owner of the entire account.

Plaintiff alleges that the net equity owned by John E. Madden Sr. on July 1, 1929, in the brokerage account with Tucker, Anthony & Company was only $21,952.84, but

alleges the fact to be that the net equity in said account, which he owned on said date, was $54,018.54.

Plaintiff denies that John E. Madden, Sr. was the owner of only a one-third interest in the credit of $305,300, which was owing by Harriman & Company to John E. Madden, Sr. on July 1, 1929, but alleges the fact to be that he was the owner of all of said credit of $305,300, on July 1, 1929.

Reply to Paragraph Three

Plaintiff denies that John E. Madden, Sr. John E. Madden, Jr. and Joseph M. Madden were, from July 1, 1924, to November 3, 1929, or at any other time, engaged as partners in the business of buying or selling securities through stock brokers in New York on the New York Stock Exchange or the New York Curb Exchange. Plaintiff denies that any such business was carried on entirely or at all in the city of New York, with stock brokers who were located in the city of New York, or with members of the New York Stock Exchange or the New York Curb Exchange or that [fol. 52] funds used in any such partnership business were kept in New York with various or any stock brokers therein.

Plaintiff denies that any assets of any such partnership consisted of accounts with brokers which were kept at all or any times in the city of New York.

Plaintiff denies that John E. Madden, Sr. engaged in any business of trading upon the stock market through stock brokers who were members of the New York Stock Exchange or the New York Curb Exchange, or that John E. Madden, Sr. devoted any or a very large portion of his time to any such business in the city of New York, and denies that his stock broker transactions were not conducted in the State of Kentucky. Plaintiff denies that he conducted a large or extensive business which involved any or large capital at any time.

Plaintiff denies that John E. Madden Jr. and or Joseph M. Madden were equal or any partners of John E. Madden Sr., or that they owned equal or any shares of any assets in any brokerage accounts owned by John E. Madden, Sr.

Plaintiff denies that any of the securities, which were referred to in the statement herein as amended, were securities registered in the brokers' names or street names as a part of the assets of said brokerage accounts.

Plaintiff denies that the assets in the brokerage accounts did not consist of stock and other securities in said accounts,

and denies that such securities were kept in the broker's names or street names, and denies that the assets of such brokerage accounts consisted of the net equity of such brokerage accounts. Plaintiff alleges the fact to be that the stocks, securities and credits in said accounts were owned by and the property of John E. Madden, Sr.

Plaintiff denies that John E. Madden, Sr. was in partnership with John E. Madden, Jr. and Joseph M. Madden, or that any such partnership had assets which were a part of [fol. 53] any business which was conducted entirely or at all in the state of New York, or that they had assets, or that any assets of such partnership consisted of any intangible property which had a permanent situs in the state of New York, or that it did not have, at any time, a situs within the state of Kentucky for taxation.

Plaintiff denies that the state of Kentucky did not furnish any protection to any or all of the alleged partnership assets and denies that it did not have power or control over said alleged assets.

Plaintiff denies that any assessment of the property for taxation set forth in the statement herein as amended, under authority of Kentucky Statute 4020, and/or any other statutes of Kentucky relating to taxation, to the executor of John E. Madden, Sr. would render them or any of them invalid or unconstitutional or would drprive the defendant herein of his property without due process of law or that he will be deprived of the equal protection of the laws in violation of the Fourteenth Amendment of the Constitution of the United States.

Reply to Paragraph Four.

Plaintiff denies that no deposits in banks in Kentucky are or have been during any of the years of 1924 to 1939, inclusive, assessed by the state of Kentucky at a rate higher than one-tenth of one per cent annually.

Plaintiff denies that any assessment upon the amount of deposits in banks outside of the State of Kentucky at five-tenths of one per cent upon money deposited in state and national banks outside of Kentucky when the rate of taxation upon bank deposits in the state of Kentucky is only one-tenth of one per cent on the amount of deposits within the state of Kentucky, that such construction of said statute will have the effect of creating an invalid or uncon-

stitutional discrimination against depositors in state and/or national banks outside the state of Kentucky, and denies that such taxation will deprive the defendant of his prop-
[fol. 54] erty without due process of law, or will deny the defendant equal protection of laws in violation of the Fourteenth Amendment of and denies that it did not have power or control over said alleged assets.

Plaintiff denies that any assessment of the property, set forth in the statement herein as amended, for taxation, under authority of Kentucky Statute 4020, and/or any other statutes of Kentucky relating to taxation, to the executor of John E. Madden, Sr. would render such statutes or any of them invalid or unconstitutional or would deprive the defendant herein of his property without due process of law or that he will be deprived of the equal protection of the laws in violation of the Fourteenth Amendment of the Constitution of the United States.

Reply to Paragraph Four.

Plaintiff denies that no deposits in banks in Kentucky are or have been during any of the years of 1924 to 1929, inclusive, assessed by the state of Kentucky at a rate higher than one-tenth of one per cent annually.

Plaintiff denies that any assessment upon the amount of deposits in banks outside of the state of Kentucky at five tenths of one per cent upon money deposited in state and national banks outside of Kentucky when the rate of taxation upon bank deposits in the state of Kentucky is only one-tenth of one per cent on the amount of deposits within the state of Kentucky, such would require a construction of Kentucky statutes 4019 and 4019a-1, which would have the effect of creating an invalid or unconstitutional discrimination against depositors in state and/or national banks outside the State of Kentucky, and denies that such taxation will deprive the defendant of his property without due process of law, or will deny the defendant equal protection of laws in violation of the Fourteenth Amendment of the Constitution of the United States, or will have the effect of imposing taxes upon the property of the same general class in violation of Section 171 of the Kentucky Constitution, [fol. 55] and denies that such assessment for taxation would violate the Constitutional provisions requiring uniform taxation of the same general class.

Wherefore, plaintiff prays as in its statement as amended herein.

Harry D. Kremer, Attorney for Plaintiff.

[File endorsement omitted.]

[fol. 56] IN COUNTY COURT OF FAYETTE COUNTY

JUDGMENT AND ORDER OF ASSESSMENT—December 29, 1933

This cause coming on regularly for trial on the 21st day of November, 1933, and the parties being present in court, and the court having heard the proof submitted by the respective parties, by their respective counsel, having submitted briefs to the court, and the court having taken the cause under advisement, and the court, being advised, on the 26th day of December, 1933, made and entered herein its written opinion in the words and figures following:

"The court is unable to write an extended opinion in this case owing to the fact that the transcript of testimony and briefs were not turned over to him until such a late date. Without going into the law of the case the Court finds:

(1) Credits consisting of money on deposit in banks in the City of New York on the respective assessing dates should be assessed against the estate of John E. Madden, deceased. According to the testimony these assessments should be made as follows:

1924	
Title Guarantee & Trust Company, deposit	$100.00
National City Bank, deposit	63,895.00
1925	
Title Guarantee & Trust Company, deposit	56,100.00
1926	
The Bank of Manhattan Company, deposit	7,200.00
Title Guarantee & Trust Company, deposit	43,700.00
The National City Bank, deposit	49,000.00
1927	
Title Guarantee & Trust Company, deposit	2,800.00
The National City Bank, deposit	56,100.00
[fol. 57] 1928	
Title Guarantee & Trust Company, deposit	34,400.00
The National City Bank, deposit	5,600.00

1929

Title Guarantee & Trust Company, deposit	10,900.00
The Bank of Manhattan Company, deposit	26,000.00
The National City Bank, deposit	21,200.00

(2) John E. Madden, at the time of his death and for a number of years prior thereto, was the owner of only a one-third (1/3) interest in the brokerage accounts handled in New York City. The stocks listed by Mr. Madden for assessment for the years 1924 to 1929, inclusive, were in excess of his net equity accounts with the brokers. There should be no additional assessment made against his estate for money owing to him by brokers in the City of New York or upon other shares of capital stock which had been purchased by him and were held by brokers on the respective assessing dates on margin accounts.

(3) The Flaherty note should be assessed for the year 1929 for $1500.00 and the Miller note for $11,000.00.

The attorneys will prepare a judgment in conformity with this opinion."

It is Ordered and Adjudged by the Court that John E. Madden, Sr. was a resident of Fayette County, Kentucky from July 1, 1924, and thereafter until his death, on November —, 1929, and that John E. Madden, Sr. died on the — day of November, 1929, and that, by appropriate orders of the Fayette County Court, John E. Madden, Jr. was appointed and qualified as the executor of the estate of John E. Madden, Sr. and has ever since been such.

It is further Ordered and Adjudged that John E. Madden, Sr. was the owner of the following intangible personal property having a taxation situs in Fayette County, Ken- [fol. 58] tucky, and that he omitted to list, and was not assessed with the same for state taxes, and that said property is liable for assessment for the years and on the valuations herein set forth, and that the same is now assessed to John E. Madden, Jr., Executor of the estate of John E. Madden, deceased, as follows, to-wit:

July 1, 1924, cash deposit in bank:

In Title Guarantee & Trust Company, deposit	$100.00
In National City Bank, deposit	63,895.00

which is now assessed for the year 1925 at the fair cash

value of $63,995.00, consisting of said cash deposit in bank;
July 1, 1925, cash deposit in bank:

In Title Guarantee & Trust Company, deposit ... $56,100.00
which is now assessed for the year 1926 at the fair cash value of $56,100.00 consisting of said deposit in bank;
July 1, 1926, cash deposit in bank:

In Banking of Manhattan Company, deposit ... $7,200.00

In Title Guarantee & Trust Company, deposit ... 43,700.00

In the National City Bank, deposit ... 49,000.00
which is now assessed for the year 1927 at the fair cash value of $99,900.00 consisting of said cash deposit in bank;
July 1st, 1927, cash deposit in bank:

In Title Guarantee & Trust Company, deposit ... $2,800.00

In the National City Bank, deposit ... $56,100.00
which is now assessed for the year 1928 at the fair cash value of $58,900.00 consisting of said cash deposit in bank;
July 1, 1928, cash deposit in bank:

In Title Guarantee and Trust Company, deposit ... $34,400.00

In the National City Bank, deposit ... 5,600.00
which is now assessed for the year 1929 at the fair cash value of $40,000.00 consisting of said cash deposit in bank;
July 1, 1929, cash deposit in bank:

In the Title Guarantee & Trust Company, deposit $10,900.00

[fol. 59] In the Bank of Manhattan Company, deposit ... $26,000.00

In the National City Bank, deposit ... 21,200.00
which is now assessed for the year 1930 at the fair cash value of $58,100.00 consisting of said cash deposit in bank.

It is further Ordered and Adjudged by the Court that the aforesaid respective bank deposits be taxed to the defendant for state of Kentucky taxes at the rate of ten cents (10¢) on each one hundred ($100.00) Dollars of said respective valuations.

It is further Ordered and Adjudged that John E. Madden, Sr. was the owner, on July 1, 1929, of a promissory note, made and executed by Mrs. P. P. Flaherty, and another note, made and executed by W. B. Miller, and that said notes had the fair cash value of $12,500.00, on July 1, 1929, and it is further Ordered and Adjudged by the court that the said two notes, be, and the same are hereby assessed to the de-

fendant for state of Kentucky taxes at the valuation of $12,500.00, and that the tax rate thereon is fixed at fifty cents (50¢) on each one hundred ($100.00) dollars of said valuation.

It is further Ordered and Adjudged by the Court that John E. Madden Sr. at the time of his death, and for a number of years prior thereto, was the owner of only a one-third interest in the brokerage accounts handled in New York City. The stocks listed by Mr. Madden for assessment for the years 1924 to 1929, inclusive, were in excess of his net equity accounts with the brokers. It is further Ordered and Adjudged that no additional assessment be made against said estate for money owing to John E. Madden Sr. by brokers in the city of New York, or upon other shares of capital stock which had been purchased by him and were held by brokers on said respective assessing dates on margin accounts.

[fol. 60] It is Further Ordered and Adjudged by the Court that no property belonging to John E. Madden, Sr. was omitted from assessment for any of the aforesaid respective years, excepting the property hereinabove ordered assessed and herein taxed.

It is Further Ordered and Adjudged that the plaintiff have judgment for and recover from the defendant a penalty of 100% of the taxes hereinabove assessed, as provided for by section 4019a-12, Kentucky Statutes, and It is Further Ordered and Adjudged, that the plaintiff recover from the defendant, and it is hereby given judgment for 20% of the taxes owing, for the use and benefit of the Back Tax Reserve Fund of the State of Kentucky, and M. J. Brennan, Revenue Agent for the state at large, as provided for by Statute, and that plaintiff have and recover from the defendant, and it is hereby given judgment for its costs herein expended.

It is Further Ordered and Adjudged that the plaintiff have and recover from the defendant interest on the taxes hereinabove assessed against defendant, at the rate of six per centum per annum from the respective dates when said taxes would have been paid, had the said property been regularly returned for assessment.

It is Further Ordered and Adjudged that the Clerk of this Court enter this judgment and order of assessment, and certify same to the Sheriff of Fayette County, and to the Auditor of Public Accounts of the State of Kentucky,

and that the sheriff of this county collect the tax, interest, state penalty, costs and Revenue Agent's penalty as other taxes are collected, and pay the state taxes, state penalty and Revenue Agent's penalty to the Auditor of Public Accounts.

To all of which judgment and order of assessment the [fol. 61] plaintiff objects and excepts, excepting that part thereof pertaining to the assessment of the Flaherty and Miller notes, and prays an *an* appeal to the Fayette Circuit Court, which is granted.

(Signed) Chester D. Adams, Judge.

Have seen: Harry D. Kremer, Attorney for Plaintiff, Bruce & Bullit, Attorneys for Defendant.

December 29, 1933.

Entered E. H. Fuller, Clerk.

[fol. 62] In Circuit Court of Fayette County

#19351

Summons on Appeal—January 2, 1934

The Commonwealth of Kentucky,

To the Sheriff of Fayette County, Greetings:

You are hereby commanded to summons John E. Madden, Jr. Executor of the Estate of John E. Madden, deceased, to appear in the Fayette Circuit Court and defendant an appeal taken by the Commonwealth of Kentucky, by M. J. Brennan, Revenue Agent for the State at Large, from the judgment of the Fayette County Court given in favor of said John E. Madden, Jr. Executor of the Estate of John E. Madden, deceased and againsts the Commonwealth of Kentucky, by M. J. Brennan, Revenue Agent for the State at Large, and warn him that upon his failure to answer for twenty (20) days after service hereof, the appeal will be taken for confessed, or he will be proceeded against for contempt, and you will make due return of this summons as provided by law.

Witness: George E. DeLong, Clerk of said Court this 2nd day of January, 1934.

George E. DeLong, Clerk, Fayette Circuit Court.

Harry D. Kremer, Plaintiff's Attorney (Appellant's Attorney in this Court).

SHERIFF'S RETURN ON FOREGOING SUMMONS ON APPEAL

[fol. 63] Executed January 5, 1934, by delivering to John E. Madden, Jr. Executor of the Estate of John E. Madden, deceased, a true copy of the within summons on appeal.

J. Porter Land, S. F. C., C. H. Farris, D. S.

[fol. 64] IN CIRCUIT OF FAYETTE COUNTY

ORDER OF SUBMISSION—March 27, 1934

This case came on for hearing before the Court on the law and facts, and a jury was waived. The defendant offered to confess judgment in open Court persuant to notice theretofore duly accepted by plaintiff, and the plaintiff in open Court declined the defendant's offer, and such notice and offer to confess judgment are filed and made a part of the record herein.

Thereupon the Court heard the evidence offered by the respective parties At the conclusion of all the evidence the defendant requested the Court to make a separate finding of the law and facts, and tendered its request for a separate finding of the law and facts, which are now filed and made a part of the record herein.

Thereupon the case was submitted to the Court on the law and facts.

[fol. 65] IN CIRCUIT COURT OF FAYETTE COUNTY

Defendant's Request for Findings of Fact and Conclusions of Law—Filed March 27, 1934

The defendant, John E. Madden, Jr., Executor of the Estate of John E. Madden, Deceased, requests the Court to make separate findings of fact and conclusions of law as follows, to-wit:

REQUESTED FINDINGS OF FACT

1. John E. Madden, deceased, was a resident of Fayette County, Kentucky, from July 1, 1924 to his death on November 3, 1929.

2. John E. Madden, Deceased, filed a Schedule with the County Tax Commissioner of Fayette County listing certain

personal property for each of the years 1924 to 1929 inclusive, copies of which schedules are filed in evidence herein and incorporated by reference as a part hereof; and John E. Madden, Deceased, paid the taxes at the rates prescribed by law for all of the personal property listed in such schedules.

3. From 1924 until his death, John E. Madden, Deceased, was a member of a partnership composed of himself and his two sons, John E. Madden, Jr., and Joseph M. Madden, in the business of buying, selling and trading in securities on margin account with brokers in the City of New York. Such business was conducted entirely within the State of New York, and all of the assets were kept in New York, and all of the trading was attended to on the ground within the State of New York, and no part of such business was conducted within the State of Kentucky, and no part of the assets of the partnership were at any time kept within the [fol. 66] State of Kentucky, and no part of the assets of the partnership were at any time kept within the State of Kentucky. The business consisted solely of trading on margin accounts with those New York brokers. Both John E. Madden, Jr., and Joseph M. Madden were at all of these times non-residents of the State of Kentucky. Such partnership business was very substantial and consisted in almost daily trading on the New York Stock Exchange and New York Curb Exchange, and such business was extensive and involved a large amount of capital and the expenditure of a great deal of time in New York, and all of John E. Madden's Deceased, participation in such business was carried on by him within the State of New York. The property of such partnership had a permanent situs in the State of New York, and no part of it at any time had a situs in the State of Kentucky in any way whatsoever for purposes of taxation, or for any other purpose. The State of Kentucky did not furnish any protection to any of the partnership assets or in any manner have any power or control over them.

4. During all the time from 1924 to 1929 inclusive, and prior thereto, it was the universal practice, usage and custom of taxpayers residing in the State of Kentucky to return for taxation only the net equity of margin accounts with brokers owned by them within the State of Kentucky determined by deducting any debit balance of such accounts

from the value of the securities therein; and it was the universal practice, usage and custom of the State Tax Commission of Kentucky to levy and assess intangible personal taxes only upon such net equity in brokerage accounts.

5. During each of the years in question, to-wit, 1924 to 1929 inclusive, John E. Madden, Deceased, listed with the [fol. 67] County Tax Commission of Fayette County, Kentucky, for taxation and paid taxes on the full value of securities which were held in brokerage accounts belonging to the aforesaid partnership, and the value of the securities so listed by him on which he paid taxes for each of such years was greater than the interest of John E. Madden, Deceased, in the equity of such brokerage accounts.

6. During the years 1924 to 1929 John E. Madden, Deceased, had interests in bank accounts in the State of New York for such years and in the amounts as follows, to-wit:

1924	$63,995.
1925	56,100.
1926	99,900.
1927	58,900,
1928	40,000.
1929	58,100.

and on July 1, 1929 John E. Madden, Deceased, was the owner of promissory notes as follows:

Flaherty note	$1,500
Miller note	11,000
Total	$12,500

It is the universal practice in Kentucky to assess bank accounts within the State of Kentucky at the rate of 1/10th of 1% based upon the amount of such deposits on July 1 of each year, and such universal practice prevailed during the years 1924 to 1929 inclusive.

[fol. 68] CONCLUSIONS OF LAW

1. If the interest of John E. Madden, deceased, in the partnership brokerage accounts of the partnership composed of himself and his two sons engaged in the business

of trading in securities with stock brokers in the State of New York, is taxable at all in Kentucky, only his portion of the net equity of the accounts is subject to taxation, as by universal practice, usage and custom, other taxpayers in the State of Kentucky are assessed and pay taxes upon only the net equity of brokerage accounts; and to require the defendant herein to pay taxes upon any other basis would deprive this defendant of his property without due process of law in violation of the Fourteenth Amendment to the Constitution of the United States, and it will deny him the equal protection of the laws and will deny him the benefit of uniform taxation in violation of Kentucky Constitution, section 171.

2. The interest of John E. Madden, deceased, in bank accounts kept outside the State of Kentucky should be taxed at the rate of only one-tenth of one per cent upon the amount of his interest in such bank accounts on July 1st of each of the years in question, as other bank accounts within the State of Kentucky are taxed at that rate. If the bank accounts of John E. Madden, deceased, in New York are taxed at a higher rate than applicable to bank accounts within the State of Kentucky, the defendant will be deprived of his property without due process of law and will be denied the equal protection of the laws in violation of the Fourteenth Amendment to the Constitution of the United States, and taxes will not thereby be assessed uniformly upon property of the same general class as required by Kentucky Constitution, section 171. Bank accounts in banks outside the State of Kentucky and in banks within the State [fol. 69] of Kentucky are of the same general class within the meaning of Kentucky Constitution, section 171.

3. The brokerage accounts owned by the partnership composed of John E. Madden, deceased, and his two sons, were not subject to taxation by the State of Kentucky as such brokerage accounts and the interest of the partners therein had a business situs within the State of New York and not within the State of Kentucky during the years 1924 to 1929, inclusive. As such brokerage accounts had a permanent business situs in the State of New York, neither they nor the interest of John E. Madden, deceased, therein had any taxable situs within the State of Kentucky and if the State of Kentucky should levy, assess or collect taxes thereon, the defendant would be deprived of his property

without due process of law in violation of the Fourteenth Amendment to the Constitution of the United States.

(Signed) Bruce & Bullitt, Attys.

[fol. 70] In Circuit Court of Fayette County

Judgment—May 3, 1935

This case came on to be heard upon the pleadings, exhibits and proof, and by agreement between the attorney for the Revenue Agent, who was present and prosecuted the case for the Commonwealth, and the defendant, a jury was waived and the case was submitted to the Court upon the law and the facts.

It is ordered and adjudged as follows, to-wit:

Finding of Fact

1. John E. Madden, Deceased, was a resident of Fayette County, Kentucky, from July 1, 1924, to his death on November 3, 1929; and John E. Madden, Jr., was duly appointed and qualified and is now acting as executor of the estate of John E. Madden, Sr.

2. John E. Madden, Deceased, filed a schedule with the County Tax Commissioner of Fayette County, listing certain personal property for each of the years 1924 to 1929 inclusive, copies of which schedules are filed in evidence herein and incorporated by reference as a part hereof; and John E. Madden, Deceased, paid the taxes at the rates prescribed by law for all of the personal property listed in such schedules.

3. From 1924 until his death, John E. Madden, Deceased, was a member of a partnership composed of himself and [fol. 71] his two sons, John E. Madden, Jr., and Joseph M. Madden, in the business of buying, selling and trading in securities on margin account with brokers in the City of New York. Such business was conducted entirely within the State of New York, and all of the assets were kept in New York, and all of the trading was attended to on the ground within the State of New York, and no part of such business was conducted within the State of Kentucky, and no part of the assets of the partnership were at any time kept within the State of Kentucky. The business con-

sisted solely of trading on margin accounts with these New York brokers. Both John E. Madden, Jr., and Joseph M. Madden were at all these times non-residents of the State of Kentucky. Such partnership business was very substantial and consisted in almost daily trading on the New York Stock Exchange and New York Curb Exchange, and such business was extensive and involved a large amount of capital and the expenditure of a great deal of time in New York, and all of John E. Madden, deceased's participation in such business was carried on by him within the State of New York. The property of such partnership had a permanent situs in the State of New York, and no part of it at any time had a situs in the State of Kentucky in any way whatsoever for purposes of taxation, or for any other purpose. The State of Kentucky did not furnish any protection to any of the partnership assets or in any manner have any power or control over them.

4. During all the time from 1924 to 1929 inclusive; and prior thereto, it was the universal practice, usage and custom of taxpayers residing in the State of Kentucky to return for taxation only the net equity of margin accounts with brokers owned by them within the State of Kentucky determined by deducting any debit balance of such accounts from [fol. 72] the value of the securities therein; and it was the universal practice, usage and custom of the State Tax Commission of Kentucky to levy and assess intangible personal taxes only upon such net equity in brokerage accounts.

5. During each of the years in question, to-wit: 1924 to 1929 inclusive, John E. Madden, Deceased, listed with the County Tax Commissioner of Fayette County, Kentucky, for taxation and paid taxes on the full value of certain securities which were held in brokerage accounts belonging to the aforesaid partnership, and the value of the securities so listed by him on which he paid taxes for each of such years was greater than the interest of John E. Madden, Deceased, in the equity of such brokerage accounts.

6. During the years 1924 to 1929 John E. Madden, deceased, had interests in bank accounts in the State of New York for such years and in the amounts as follows, to-wit:

1924	$63,995
1925	56,100

1926	99,900
1927	58,900
1928	40,000
1929	58,100

and on July 1, 1929, John E. Madden, Deceased, was the owner of promissory notes as follows:

Flaherty note	$ 1,500
Miller note	11,000
	$12,500

and that John E. Madden did not omit from assessment any property subject to taxation in Kentucky for any of [fol. 73] the years 1924 to 1929 inclusive, except such bank deposits and promissory notes for the above years respectively.

It is the universal practice in Kentucky to assess bank accounts at the rate of 1/10th of 1% based upon the amount of such deposits on July 1 of each year, and such universal practice prevailed during the years 1924 to 1929 inclusive.

Conclusions of Law

1. The interest of John E. Madden, deceased, in bank accounts kept outside the State of Kentucky should be taxed at the rate of only one-tenth of one per cent upon the amount of his interest in such bank accounts on July 1st of each of the years in question, as other bank accounts within the State of Kentucky are taxed at that rate. If the bank accounts of John E. Madden, deceased, in New York are taxed at a higher rate than that applicable to bank accounts within the State of Kentucky, the defendant will be deprived of his property without due process of law and will be denied the equal protection of the law in violation of the Fourteenth Amendment to the Constitution of the United States, and taxes will not thereby be assessed uniformly upon property of the same general class as required by Kentucky Statute, section 171. Bank accounts in banks outside the State of Kentucky and in banks within the State of Kentucky are of the same general class within the meaning of Kentucky Statute, section 171.

2. The brokerage accounts owned by the partnership composed of John E. Madden, deceased, and his two sons,

[fol. 74] were not subject to taxation by the State of Kentucky as such brokerage accounts and the interest of the partners therein had a business situs within the State of New York and not within the State of Kentucky during the years 1924 to 1929, inclusive. As such brokerage accounts had a permanent business situs in the State of New York, neither they nor the interest of John E. Madden, deceased, therein, had any taxable situs within the State of Kentucky and if the State of Kentucky should levy, assess or collect taxes thereon, the defendant would be deprived of his property without due process of law in violation of the Fourteenth Amendment to the Constitution of the United States.

3. By the universal practice, custom and usage, taxpayers in the State of Kentucky for the years 1924 to 1929, inclusive, were assessed and paid taxes upon only the net equity of brokerage accounts; and to require any taxpayer to pay taxes upon any other basis under such circumstances would deprive such taxpayer of his property without due process of law in violation of the Fourteenth Amendment of the Cons-itution of the United States; and would deny him the equal protection of the laws thereunder and would deny him the benefit of uniform taxation in violation of Kentucky Constitution section 171.

It is therefore ordered and adjudged that the defendant is liable to the plaintiff for taxes upon the respective amounts of the bank accounts in New York for the years 1924 to 1929 inclusive, and for the said Flaherty note and Miller note for the year 1929, as set out in finding of fact No. 6 herein; and that the defendant did not fail to list or pay taxes upon any other property for any of the said years in question; that the rate of taxes upon such bank accounts is one tenth of 1% and the rate of taxes upon such [fol. 75] notes is five tenths of 1% for each of such years; that the defendant is liable for interest on the amount of such respective assessments at the rate of 6% per annum from the respective dates when such taxes should have been paid, and a penalty of 100% on the principal amount of such taxes without interest or penalty to be assessed upon the said New York bank deposits and the said Flaherty and Miller notes; and the defendant is further liable to the plaintiff for a penalty of 20% of the amount of such taxes for the use and benefit of the Back Tax Reserve Fund for the State of Kentucky and M. J. Brennan, Revenue Agent for

the State-at-Large; but the plaintiff shall not recover any costs expended in the Circuit Court as the full amount of the said recovery to the plaintiff is less than the amount for which the defendant offered to confess judgment, which offer the plaintiff declined; and the Clerk of this Court shall certify to the Sheriff of Fayette County and to the Auditor of Public Accounts of the State of Kentucky that the Sheriff of this County shall collect the tax, interest, state penalty, and Revenue Agent's penalty, as other taxes are collected and pay the state taxes, state penalty and Revenue Agent's penalty to the Auditor of Public Accounts, to all of which the defendant objects and excepts, and prays an appeal to the Court of Appeals, which is hereby granted.

[fol. 76] IN CIRCUIT COURT OF FAYETTE COUNTY

PLAINTIFF'S OBJECTIONS AND EXCEPTIONS TO JUDGMENT—Filed May 6, 1935

Comes the plaintiff and objects and excepts to Findings of Fact, numbered 2, 3, 4, 5 and 6, of the court herein, because they are not supported by the proof, and comes the plaintiff and objects and excepts to the Conclusions of law, numbered 1, 2 and 3, of the court herein, because the same are not supported by sufficient evidence or by law, and comes the plaintiff and objects and excepts to the Judgment rendered herein, and moves the court for an order vacating and setting aside the judgment rendered herein, upon the grounds that said judgment is not sustained by the sufficient evidence, and is contrary to law, and asks for a new trial upon said grounds.

Harry D. Kremer, Attorney for Plaintiff.

[fol. 77] IN CIRCUIT COURT OF FAYETTE COUNTY

ORDER OVERRULING PLAINTIFF'S OBJECTIONS ETC.—May 10, 1935

Plaintiff's objections and exceptions to Findings of Fact, numbered 2, 3, 4, 5 and 6, of the court herein, and its objections and exceptions to the Conclusions of Law, numbered 1, 2 and 3, of the court herein, and its objections and excep-

tions to the judgment rendered herein and plaintiff's motion for an order of this court vacating and setting aside the Judgment rendered herein, which motion was based upon the grounds that said Judgment is not sustained by sufficient evidence and is contrary to law, coming on regularly for hearing, and the court now being advised, all of said objections and exceptions and said motion are overruled, to which ruling of the court the plaintiff objects and excepts.

On May 6, 1935, plaintiff filed in open court its motion and grounds for a new trial, and the court, on said date, ordered that the filing of the same be noted of record as so filed, and it is now ordered by the court that said motion and grounds be made a part of the record in this action, which is done; and said motion being this day heard, it is ordered and adjudged by the court that said motion be and the same is hereby overruled, to which ruling of the court the plaintiff objects and excepts, and prays an appeal from the Judgment herein to the Court of Appeals of Kentucky, which is granted.

It is further ordered and adjudged by the court that plaintiff be and it is hereby given sixty (60) days within which to prepare and file its bill of Exceptions.

Dated this 10th day of May, 1935.

[fols. 78-81] The Order and Opinion of the Court of Appeals of Kentucky, June 23, 1936 in Commonwealth of Kentucky, by etc., Appellant against John E. Madden's Executor, Appellee (165 Ky. 684, 97 S. W. (2d) 561) appear on pages 83-94, infra.

[fol. 82] In Circuit Court of Fayette County

Mandate of Court of Appeals—Filed June 1, 1937

In Court of Appeals of Kentucky—Spring Term, June 23, 1936

Commonwealth of Kentucky, et al, Appellant

Against

John E. Madden's Executor, Appellee

[fol. 83] Appeal from a Judgment of the Fayette Circuit Court

The Court being sufficiently advised, it seems to them the judgment herein is erroneous.

It is therefore considered that said judgment be reversed, and cause remanded for proceedings not inconsistent with the opinion herein;

Which is ordered to be certified to said Court.

A copy-attest:

Chas. K. O'Connell, C. C. A., by Alice Griffin, D. C.

Issued 11-20-1936.

IN CIRCUIT COURT OF FAYETTE COUNTY

OPINION OF COURT OF APPEALS—Filed June 2, 1937

IN COURT OF APPEALS OF KENTUCKY

APPEAL FROM FAYETTE CIRCUIT COURT

June 23, 1936

COMMONWEALTH OF KENTUCKY, by etc., Appellant

v.

JOHN E. MADDEN'S EXECUTOR, Appellee

Opinion of the Court by Judge Stites, reversing.

[fol. 84] John E. Madden died on November 3, 1929, a resident of Fayette County, Kentucky. Shortly after his death this proceeding was filed for the purpose of taxing certain intangible personal property owned by Mr. Madden and alleged to have been omitted from assessment during the years 1924 to 1929, inclusive. The administrators of Mr. Madden's estate admitted his failure to list some of the property, and it was thereupon retroactively assessed without contest. The only questions presented for our consideration are (1) the power of the State of Kentucky to tax securities owned by a partnership of which Mr. Madden was a member, and (2) the rate of taxation to be applied to deposits in New York Banks to the individual credit of the decedent during the period in question. The trial court held that the partnership securities, all of which were pledged with brokers on margin accounts in New York and were carried principally in "street names," had acquired a business situs in New York and were not taxable in Kentucky. The court likewise held that the deposits in

New York banks to Mr. Madden's individual account were subject to a tax of but ten cents on the $100.00 (the rate applied to deposits in banks in Kentucky) and that to tax these deposits as other credits generally (at fifty cents on the $100.00) would be a denial of equal protection. The revenue agent has appealed. We will consider the questions in the order stated above.

For a number of years Mr. Madden was engaged in operations on the New York Stock Exchange as an equal partner with his two sons, one of whom was a resident of Oklahoma and the other a resident of Iowa. Appellant complains of this finding and urges that certain of the brokerage accounts were operated for Mr. Madden's individual benefit, but we think the evidence amply supported the conclusion [fol. 85] that all of these transactions in brokerage accounts were on behalf of the partnership. It was likewise established that the operations of the partnership were conducted exclusively in New York. Mr. Madden spent the greater part of each year in New York City and personally attended to the buying and selling of most of the securities there held.

It is established that the partnership assets were invested and reinvested on the New York Stock Exchange by Mr. Madden and at times b- one or the other of his two sons. Clearly, the situs of these assets for ad valorem taxation was in New York. Compare Blodgett v. Silberman, 277 U. S. 1, 48 Sup. Ct. 410. Whether the situs was likewise in New York for inheritance tax purposes, it is, of course, unnecessary here to decide. See Buck v. Beach, 206 U. S. 392, Sup. Ct. 712; Wheeler v. Sohmer, 233 U. S. 434. Any doubt that may have existed by virtue of recent decisions of the Supreme Court of the United States as to *to* whether or not the maxim of "mobilia sequentur personam." would be invariably applied to intengible property and "business situs" no longer recognized, has been set at rest by the decision of that Court in the case of Wheeling Steel Corporation v. Fox, — U. S. 80 L. Ed. 809, (decided May 18, 1936). The Court there considered the question of the validity of an ad valorem property tax laid by West Virginia upon the accounts receivable and bank deposits in other states of a Delaware corporation having its principal office in West Virginia. In determining as a matter of fact that the methods of doing business by the corporation were such as to localize its tangible property (not taxed else-

where) for purposes of taxation, in West Virginia, the Court said:

[fol. 86] "The tax is not a privilege or occupation tax. It is *now* a tax on net income. See Hans Rees' Sons v. North Carolina, 283 U. S. 123, 133. It is an *ad valorem* property tax. We have held that it is essential to the validity of such a tax, under the due process clause, that the property shall be within the territorial jurisdiction of the taxing state. This rule receives its most familiar illustration in the case of land. The rule has been extended to tangible personal property which is thus subject to taxation exclusively in the state where it is permanently located, regardless of the domicile of the owner.

Union Refrigerator Transit Co. v. Kentucky, 199 U. S. 194, 204, 206; *Frick v. Penn.*, 268 U. S. 473, 489. We have said that the application to the States of the rule of due process arises from the fact 'that their spheres of activity are enforced and protected by the Constitution' and therefore it is impossible for one State to reach out and tax property in another without violating the Constitution.' United States v. Bennett, 232 U. S. 299, 306. Compare Burnet v. Brooks, 288 U. S. 378, 401. When we deal with intangible property, such as credits and choses in action generally, we encounter the difficulty that by reason of the absence of physical characteristics they have no situs in the physical sense, but have the situs attributable to them in legal conception. Accordingly we have held that a State may properly apply the rule *Mobilia sequuntus personam* and treat them as localized at the owner's domicile for pur-[fol. 87] pose of taxation. Farmer's Loan & Trust Co. vs. Minnesota, 280 U. S. 204, 211. And having thus determined 'that in general intangibles may be properly taxed at the domicile of their owner,' we have found 'no sufficient reason for saying that they are not entitled to enjoy an immunity against taxation at more than one place similar to that accorded to tangibles.' Id. P. 212. The principle thus announced in Farmers Loan & Trust Co. v. Minnesota, has had progressive application. Baldwin v. Missouri, 281 U. S. 586; Beidelr v. South Carolina Tax Commission, 282 U. S. —; First National Bank v. Maine, 284 U. S. 312, 328, 329. But despite the wide application of the principle, an important exception has been recognized.

"In the case of intangible property the ancient maxim, which had its origin when personal property consisted in the main of articles appertaining to the person of the owner, yield- in modern times to the 'law of the place where the property is kept and used.' First National Bank v. Maine, supra. It was in view 'of the enormous increase of such property since the introduction of railways and the growth of manufactures' that it came to be regarded as 'having a situs of its own for the purpose of taxation, and correlatively to exempt at the domicile of its owner.' Union Re- [fol. 88] frigerator Transit Co. v. Kentucky, supra, P. —. There has been an analogous development in connection with intangible property by reason of the creation of choses in action in the conduct by an owner of his business in a State different from that of his domicile. New Orleans v. Stempel, 175 U. S. 309; Bristol v. Washington County, 177 U. S. 133; Board of Assessors v. Comptoir National, 191 U. S. 388; Metropolitan Life Insurance Co. v. New Orleans, 205 U. S. 395; Liverpool & L. & G. Insurance Co. v. New Orleans, 221 U. S. 346.

"These cases, we said in Farmers' Loan & Trust Company v. Minnesota, supra, p. 213, 'recognize the principle that choses in action may acquire a situs for taxation other than at the domicile of their owner if they have become integral parts of some local business.' We adverted to this reservation in Beidler v. South Carolina Tax Commission, supra, p. 8, and in First National Bank v. Maine, supra, p. 331."

Applying these principles to the case at bar, we are compelled to recognize that the business of the Madden partnership was localized in New York. All of the partnership accounts were carried with brokers there, the securities purchased and sold were carried in the names of New York brokers, and the trading was almost universally carried on in person by Mr. Madden at the brokerage offices. In fact, [fol. 89] the testimony indicates that he was more often sojourning in New York than in his technical legal residence in Kentucky. We conclude, therefore, that Mr. Madden's interest in the assets of the partnership was localized in New York and beyond the power of Kentucky to tax. His interest in the going partnership was not a thing apart from the partnership itself.

As to the taxation of general deposits in the name of

Mr. Madden in New York banks, no question of situs is presented. It is admitted that these deposits are taxable in Kentucky, but it is urged that the rate to be applied must be that fixed on deposits in banks organized under the laws of this state or national banks doing business in this state, and that to apply to these deposits the rate applicable to intangible property generally is to deny to appellee the equal protection of the law secured to him by the Fourteenth Amendment to the Constitution of the United States. Whether or not this contention is correct must depend, of course, upon the reasonableness of the classification made by Section 4019a-1 of the Kentucky Statutes, placing the deposits in banks, resident in this state, in a separate class for purposes of taxation, and fixing thereon a rate of but ten cents on the $100.00, as compared to the fifty-cents rate applicable to intangible generally.

It cannot be disputed that the classification made by Section 4019a-1 is limited by its terms to the banks organized under the laws of this state and national banks doing business here. The deposits in non-resident banks, therefore, must be taxed at the general intangible rate unless to do so would be contrary to the Fourteenth Amendment. Per- [fol. 90] haps the most quoted discussion of the rules applicable to classification for taxation under the equal protection clause is found in the case of Bell's Gap R. R. Co. v. Pennsylvania, 134 U. S. 232, where the Court said:

"The provision in the Fourteenth Amendment, that no state shall deny to any person within its jurisdiction the equal protection of the laws, was not intended to prevent a State from adjusting its system of taxation in all proper and reasonable ways. It may, if it chooses, exempt certain classes of property from any taxation at all, such as churches, libraries and the property of charitable institutions. It may impose different specific taxes upon different trades and professions, and may vary the rates of excise upon various products; it may tax real estate and personal property in a different manner; it may tax visible property only, and not tax securities for payment of money; it may allow deductions for indebtedness, or not allow them. All such regulations and those of like character, so long as they proceed within reasonable limits and general usage, are within the discretion of the state legislature, or the people of the State in framing their Constitution. But

clear and hostile discriminations against particular persons and classes, especially such as are of an unusual character, unknown to the practice of our governments, might be obnoxious to the constitutional prohibition. It would, however, be impracticable and unwise to attempt to lay down any general rule or definition on the subject, that would [fol. 91] include all cases. They must be decided as they arise. We think that we are safe in saying, that the Fourteenth Amendment was not intended to compel the State to adopt an iron rule of equal taxation. If that were its proper construction, it would not only supersede all those constitutional provisions and laws of some of the States, whose object is to secure equality of taxation, and which are usually accompanied with qualifications deemed material; but it would render nugatory those discriminations which the best interests of society require; which are necessary for the encouragement of needed and useful industries, and the discouragement of intemperance and vice; and which every State, in one form or another, deems it expedient to adopt."

Again, in Watson v. State Comptroller, 254 U. S. 122, it is said:

"Any classification is permissible which has a reasonable relation to some permitted end of governmental action. * * * It is enough, for instance, if the classification is reasonably founded in 'the purposes and policy of taxation.'"

Plainly, the placing of local bank deposits in a separate class and according to them a more favorable rate than is assessed against other intangible property "is reasonably founded in the purposes and policy of taxation." At the time that the 1917 classification law was enacted, following the amendment to Section 171 of the State Con- [fol. 92] stitution, the Legislature had before it the report of the Special Tax Commission, which showed that, under the old general property tax, out of $123,000,000 of bank deposits in the state, only $12,847,868,—or a little over 10% —were returned for taxation (Report, Special Tax Commission, 1912-1914). It was likewise a matter of general information that a large part of the money on deposit in banks went into hiding on the tax date, and there was a corresponding contraction in the assets of the banks at a

time when crops were moving, and an increase rather than a decrease, in credit was necessary. In order to meet this economic situation, as well as the practical exigencies of taxation, a rate was fixed sufficiently low to encourage the building up of deposits on the tax date, and the banks were required to report and pay the tax on this species of property as agents for their depositors. The reasonableness of this provision is demonstrable in the fact that more taxes are actually raised under the lower rate than were paid when the full rate was applied under the old general property tax law. Obviously, therefore, the classification is a valid one so far as it affects property within the state.

It is argued, however, that the deposits in non-resident banks must be accorded the same favorable classification, and we are cited to the recent decision of the Supreme Court of the United States in the case of Colgate v. Harvey, —U. S. —, 80 L. Ed. 225, wherein a statute of Vermont was held to violate the privilege and immunities clause of the Federal Constitution in taxing the income derived from loans outside of the state while exempting similar loans made within the state. However, the opinion of the [fol. 93] Court in that case itself states the distinguishing feature between that case and this. The Court said:

"We are unable to find in the provision any public purpose which can be subserved by making the taxation of income from loans dependent merely upon the adventitious circumstance as to the place of making the loan."

In the case at bar there is an obvious public purpose to be subserved and an obvious quid pro quo to be received by the state from its local banks as distinguished from non-resident banks. There is no way of guaranteeing that deposits in banks of other states will be reported for taxation by those banks or that the tax will be paid by such banks and charged to the account of the depositor, as is the case with local banks. Similarly, there is no public reason for seeking to build up the deposits in non-resident banks on the taxing date, and consequently no reason why the deposits in non-resident banks should be accorded a privilege not granted to other credits generally. There is no "clear and hostile discrimination" embodied in Section 4919a-1 directed against deposits in non-resident banks. Any discrimination that exists is merely incidental to a legitimate classification, and results simply from the lack

of power in the state to reach banks beyond its jurisdiction, and from the absence of the sound economic reasons which justify the classification when applied to domestic banks [fol. 94] but which fail when extended beyond the boundaries of the state. A non-resident who deposits his money in a Kentucky bank, and permits it to acquire a taxable situs here, is accorded the same favorable rate that is fixed on the deposit of a resident of this state. If a resident of this state chooses to place his funds in a foreign bank, he, in effect, himself selects the classification of his property for taxation. Metropolis Theatre Company vs. Chicago, 288 United States, 61. We can find in these facts no denial of equal protection nor any abridgement of privileges and immunities.

It follows that the judgment of the trial court is erroneous in so far as it applies the ten cent rate instead of the fifty-cent rate to the deposits of Mr. Madden in the New York banks.

Judgment reversed for proceedings consistant herewith.

Attorneys for Appellant, Harry D. Kremer, Lexington, Ky., Samuel H. Cole, Lexington, Ky., Attorneys for Appellee, William Marshall Bullitt, Louisville, Ky., Bruce & Bullitt, Louisville, Ky., Leo T. Wolford, Louisville, Ky., Middleton Miller, Louisville, Ky., William H. Abell, Louisville, Ky., William A. Minihan, Lexington, Ky.

A Copy Attest:

Charles K. O'Connell, Clerk, Court of Appeals of Kentucky.

[fol. 95] [File endorsement omitted.]

IN CIRCUIT COURT OF FAYETTE COUNTY

ORDER RE OPINION AND MANDATE OF COURT OF APPEALS—June 5, 1937

Plaintiff having filed the mandate and opinion of the Court of Appeals herein the office of the Clerk of this Court on June 1st, 1937, and June 2nd, 1937, respectively, It is Now Ordered that the said filings be and the same are noted of record.

[fol. 96] IN CIRCUIT COURT OF FAYETTE COUNTY

MOTION FOR JUDGMENT—Filed June 14, 1937

Comes the plaintiff and moves the court for an order redocketing this action; and (2) moves the court for an order submitting this cause for final judgment in conformity with the mandate and opinion of the Court of Appeals rendered November 20th, 1936, in this cause; and (3) plaintiff moves the court for final judgment and entry thereof in conformity with said mandate and opinion.

Dated this 14th day of June, 1937.

Harry D. Kremer, Attorney for Plaintiff, Samuel H. Cole County Attorney.

[fol. 97] IN CIRCUIT COURT OF FAYETTE COUNTY

MOTION FOR SUBSTITUTION—Filed June 14, 1937

Comes the plaintiff, Commonwealth of Kentucky, by its counsel, and represents to this Honorable Court that the General Assembly of Kentucky has abolished the office of Revenue Agent and has given the Commissioner of Revenue of Kentucky sole power and authority to act as relator for the Commonwealth of Kentucky in all actions for the assessment of omitted property and the collection of delinquent taxes. And plaintiff further represents to this court that M. J. Brennan is no longer Revenue Agent for the State at large, and therefore, is not relator in this action any longer, and plaintiff represents to this court that James W. Martin is the duly appointed, qualified and acting Commissioner of Revenue of Kentucky, and, as such officer, is the only person having authority to be relator in this action in future proceedings.

Now, therefore, comes the plaintiff, Commonwealth of Kentucky, and moves the court for an order making James W. Martin, as Commissioner of Revenue, the relator in this action henceforward in lieu of and instead of M. J. Brennan.

Harry D. Kremer, Attorney for Plaintiff.

This motion is approved this 9th day of June, 1937.

James W. Martin, Commissioner of Revenue.

[fol. 98] IN CIRCUIT COURT OF FAYETTE COUNTY

ORDER OF CONTINUANCE—June 19, 1937

The plaintiff, on June 14th, 1937, having filed a motion in this cause for an order of court making James W. Martin, as Commissioner of Revenue, relator in this action henceforward in lieu of and instead of M. J. Brennan, and said motion was set for hearing for June 19th, 1937, and the Sheriff of the above county having duly served the defendant with notice on June 4th, 1937, that plaintiff would make the following motions on June 19th, 1937, and the plaintiff having filed its motions in said action in this court on June 14th, 1937, as follows: That it would move the court for an order on said June 19th, 1937 redocketing this action; and (2) that it would move the court for an order submitting this cause for final judgment in conformity with the mandate and opinion of the Court of Appeals rendered November 20th, 1936, in this cause, and that plaintiff would move the court for final judgment and entry thereof in conformity with said mandate and opinion on June 19th, 1937, but it now appearing to the court that defendant's counsel cannot be present in court on said June 19th, 1937, it is now ordered and adjudged that the hearings on said motions will be continued until 9:30 o'clock A. M. on June 26th, 1937.

[fol. 99] JUNE 26, 1937

Comes defendant and files an Amended Answer herein which is noted.

Comes defendant and files a request for findings of fact and conclusions of law herein, which is noted.

IN CIRCUIT COURT OF FAYETTE COUNTY

Defendant's Request for Findings of Fact and Conclusions of Law—Filed June 26, 1937

The defendant, John E. Madden, Jr., Executor of the estate of John E. Madden, deceased, requests the Court *for* make separate findings of fact and conclusions of law as follows, to-wit:

[fol. 100] REQUESTED FINDINGS OF FACT

It was the universal practice in Kentucky during the years 1924 to 1929, inclusive, to assess bank accounts within

the State of Kentucky at a rate of one-tenth of one per cent based upon the amount of such deposits on July 1, of each year; and such universal practice prevailed during the years 1924 to 1929, inclusive.

CONCLUSIONS OF LAW

The interest of John E. Madden, deceased in bank accounts kept outside the State of Kentucky should be taxed at the rate of only one-tenth of one per cent upon the amount of his interest in such bank accounts on July 1 of each of the years in question as (a) it was the universal practice to tax bank accounts within the State of Kentucky at such rate during such years; and (b) if the bank accounts of John E. Madden, deceased, in New York banks are taxable under the Kentucky statute at a rate of taxation higher than that applicable to bank accounts within the State of Kentucky or higher than the rate of taxation paid on bank accounts within the State of Kentucky, such statute will abridge the privileges and immunities of the defendant, and would have abridged the privileges and immunities of Section 1 of the Fourteenth Amendment to the Constitution of the United States; and (c) any different rate applied to taxation on bank deposits kept outside the State of Kentucky would have the effect of making such assessments lacking in uniformity upon proper- of the same general class as required by Kentucky Constitution, Section 171. [fol. 101] banks within the State of Kentucky are of the same general class within the meaning of Kentucky Constitution Section 171.

In the court's conclusions of law made upon the first trial of this case, it was found as a matter of law that to tax banks accounts outside the State of Kentucky at a higher rate than that applied to bank accounts within the State of Kentucky, would violate the uniformity clause as required by Kentucky Constitution Section 171, and that bank accounts in banks outside the State of Kentucky and in banks within the State of Kentucky are of the same general class within the meaning of Kentucky Constitution, Section 171. The decision of the Court of Appeals herein (Commonwealth vs. Madden's Executor, 265 Ky. 684) does not reverse this ruling and consequently such ruling has become and is the law of this case.

W. A. Minihan, Bruce and Bullitt, Counsel for Defendant.

In Circuit Court of Fayette County

Amendment to Defendants Answer as Amended—Filed June 26, 1937

[fol. 102] The defendant, John E. Madden, Jr., Executor of the estate of John E. Madden, deceased, for amendment to his answer herein as amended, and particularly to Paragraph Four of his amended answer filed herein on November 21st, 1933, states as follows, to-wit:

If Kentucky Stat-es **4019 and 4019-1, or other Statutes of the State of Kentucky relating to taxation upon the amount of deposits in banks, are construed to require the assessment at the rate of five-tenths of one per cent upon money deposited in state or national banks outside of Kentucky, and at the rate of only one-tenth of one per cent of the amount of deposits within the State of Kentucky, such construction of the said statutes will have the effect of making such statutes invalid and unconstitutional (1) in violation of * 2 of Article IV of the Constitution of the United States, which provides that,

"The citizens of each state shall be entitled to all privileges and immunities of citizens of the several states;"

and (2) in violation of the Fourteenth Amendment, *1 to the Constitution of the United States, which provides that

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; * * *"

The decedent, John E. Madden, was a citizen of the United States and of the State of Kentucky, and if he, or his estate, is required to pay taxes at a higher rate on bank [fol. 103] deposits outside the State of Kentucky than are assessed under the statutes of the State of Kentucky for bank deposits made within the State of Kentucky, he, and his estate, will have been, as a result of such statutes so construed, denied the privileges and immunities of citizens of the United States; and the defendant pleads and relies upon the invalidity and unconstitutionality of the said Kentucky Statutes as so construed by the opinion of the Court of Appeals herein, as denying to him the equal privileges

and immunities so guaranteed by the clauses of the Constitution of the United States above referred to.

Wherefore, the defendant, John E. Madden, Jr., Executor of the estate of John E. Madden, deceased, prays that the plaintiff's petition herein as amended be dismissed; for his costs herein expended and for all proper relief.

W. A. Minihan, Bruce and Bullitt, Counsel for the Defendant.

IN CIRCUIT COURT OF FAYETTE COUNTY

REPLY—Filed June 28, 1937

[fol. 104] Comes the plaintiff, by James W. Martin, Commissioner of Revenue, and for reply to the amendment to defendant's answer as amended, denies that if Kentucky Statutes, Section 4019, or Section 4019a-1, or any other statutes of the State of Kentucky relating to taxation upon the amount of deposits in banks is or are construed to require the assessment at the rate of five-tenths of one per cent upon money deposited in state or national banks outside of Kentucky, and that the rate of only one-tenth of one per cent of the amount of deposits within the State of Kentucky, such construction of said statutes, or any of them, will have the effect of making such statutes, or any of them, invalid or unconstitutional, or in violation of Section 2 of article 4 of the Constitution of the United States, which provides that

"The citizens of each state shall be entitled to all privileges and immunities of citizens of the several states;"

and denies that such construction of said statutes, or any of them, would be in violation of the 14th Amendment of the Constitution of the United States, which provides that

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States.;" • • •"

Plaintiff admits that the decedent, John E. Madden, was a citizen of the United States and of the State of Kentucky, [fol. 105] but denies that if he, or his estate, is required

to pay taxes at a higher rate on bank deposits outside the State of Kentucky than are assessed under the statutes of the State of Kentucky for bank deposits made within the State of Kentucky, that, he, or his estate, will have been, as a result of such statutes so construed, denied the privileges or immunities of citizens of the United States. Plaintiff denies that the defendant has pled, or that he relies upon any invalidity or unconstitutionality of said Kentucky Statutes, or any of them, as construed by the opinion of the Court of Appeals herein, and denies that that construction by the Court of Appeals has denied him the equal privileges or immunities guaranteed by the said clauses of the Constitution of the United States, above referred to.

Wherefore, plaintiff prays as in its statement and amended statements.

Samuel H. Cole, Harry D. Kremer, Attorneys for Plaintiff.

[fol. 106] In Circuit Court of Fayette County

Motion for Judgment—Filed Sept. 27, 1937

Comes the plaintiff and moves the court for final judgment and entry thereof in conformity with the mandate and opinion of the Court of Appeals in this action.

Dated this 27th day of September, 1937.

Harry D. Kremer, Attorney for Plaintiff.

In Circuit Court of Fayette County

Order Redocketing Cause etc.—Oct. 1, 1937

Plaintiff's motion to redocket this cause and submit same for trial and final judgment, and plaintiff's motion for an order making James W. Martin, Commissioner of Revenue, relator herein in lieu of and instead of M. J. Brennan, former Revenue Agent, came on regularly for hearing. Said motion to redocket this cause and to make James W. Martin, Commissioner of Revenue, relator herein are sustained and this cause is now redocketed, and it is ordered by the Court that James W. Martin be and he is now made relator in this action in lieu of and instead of M. J. Brennan, former Revenue Agent.

[fol. 107] Thereupon, came the defendant, and by leave of Court, filed an amendment to defendant's answer as amended and came the plaintiff, by counsel, and, by leave of court, filed plaintiff's Reply to the amendment to defendant's answer as amended. Whereupon plaintiff's motion that this cause be submitted for trial and final judgment was sustained, and it is now ordered and adjudged by the Court that this cause be and the same is now submitted for trial and final judgment.

Thereupon, came the defendant and made and filed defendant's request for findings of fact and conclusions of law, to which ruling of said request for findings of fact and conclusions of law the plaintiff then and there objected and excepted.

IN CIRCUIT COURT OF FAYETTE COUNTY

MOTION TO STRIKE—Filed Oct. 21, 1937

Comes the plaintiff and moves the court to strike defendant's Amendment to Defendant's Answer as Amended from the record.

[fol. 108] Harry D. Kremer, Attorney for Plaintiff.

IN CIRCUIT COURT OF FAYETTE COUNTY

ORDER OF SUBMISSION—Oct. 29, 1937

Plaintiff's motion to strike Defendant's Amendment to Defendant's Answer as Amended from the record coming on regularly for hearing, said Motion is now submitted to the court for decision, and defendant is given one week within which to file a brief in reply to plaintiff's brief.

[fol. 109] IN CIRCUIT COURT OF FAYETTE COUNTY

JUDGMENT—Jan. 22, 1938

The plaintiff, Commonwealth of Kentucky, having taken an appeal from this court to the Court of Appeals from the judgment of this court rendered herein, and the Court of Appeals having reversed the judgment of this court, and the plaintiff, Commonwealth of Kentucky, having heretofore, on the 1st day of June, 1937, filed with the Clerk of this

court the mandate of the Court of Appeals, and having heretofore, on the 2nd day of June, 1937, filed with the Clerk of this court the opinion of the Court of Appeals, and the filing of both having been noted of record by order of this court entered June 5th, 1937, and the defendant, John E. Madden, Jr., Executor of the estate of John E. Madden, deceased, having heretofore on the 4th day of June, 1937, been regularly served with notice that said mandate and opinion had been filed as aforesaid in this court, and that plaintiff would move this court on June 19th, 1937, to redocket this cause and to submit same for final judgment, and would ask the court to render final judgment, all of said date, and this cause having been placed upon the trial docket to be called on June 19th, 1937, for submission for judgment, and plaintiff having filed its motion in said court on June 14th, 1937, for an order making James W. Martin, Commissioner of Revenue, relator herein in lieu of [fol. 110] and instead of M. J. Brennan, former Revenue Agent, and plaintiff having filed its motion in this court on June 14th, 1937, wherein it moved the court for an order redocketing this cause, and wherein it also moved the court for an order submitting this cause for final judgment, and wherein it also moved this court for final judgment, and all of said motions and said submission for judgment coming on regularly for hearing on June 19th, 1937, and whereas, counsel for the respective parties were present in court on said June 19th, 1937, but defendant's counsel announced that the chief counsel for the defendant, to-wit, Leo T. Wolford, could not be present in court at that time, and moved the court for an order continuing the hearing on said motions and on said submission for final judgment to June 26th, 1937. Thereupon, by agreement of counsel for the respective parties, this court entered its order that the hearings on said motions and submission for final judgment and the trial of this cause be continued to and be heard at 9:30 o'clock A. M. on June 26th, 1937.

Pursuant to said order made June 19th, 1937, this cause came on for hearing, upon said motions and for trial and final judgment, on June 26th, 1937, whereupon plaintiff's motion to redocket this cause and submit same for trial and final judgment, on June 26th, 1937, whereupon plaintiff's motion to redocket this cause and submit same for trial and final judgment was sustained, and plaintiff's motion for an order making James W. Martin, Commissioner of Revenue,

relator herein in lieu of and instead of M. J. Brennan, was sustained, and this court ordered this action redocketed and ordered that James W. Martin, Commissioner of Revenue, [fol. 111] be the relator herein henceforward. Whereupon, the defendant filed an Amendment to Defendant's Answer as Amended and filed a Request for Findings of Fact and Conclusions of Law on said Amendment, and plaintiff filed its Reply to the Amendment to Defendant's Answer as Amended. The court announced that it was not fully advised, and therefore took time to pass upon the matters presented and to render final judgment and called on the respective parties for briefs. Said order was made on June 26th, 1937 and was entered of record on October 1st, 1937. And the plaintiff came on September 27th, 1937 and moved the court for final judgment and entry thereof in conformity with the mandate and opinion of the Court of Appeals, and the plaintiff also came on October 21st, 1937, and moved the court to strike defendant's Amendment to defendant's Answer as Amended from the record. By an order of this court entered October 29th, 1937, said motion to strike defendant's Amendment to defendant's Answer as Amended from the record was submitted to the court for decision. The respective parties having filed briefs herein on said motions, and the court now being fully advised, It Is Now Ordered and Adjudged that plaintiff's motion to strike defendant's Amendment to defendant's Answer as Amended from the record be and the same is now overruled to which ruling the plaintiff excepted; and It Is Now Ordered and Adjudged that this cause be and it is now submitted for trial and final judgment.

It Is Ordered and Adjudged that John E. Madden, Jr. is the duly appointed, qualified and acting Executor of the estate of John E. Madden, deceased.

[fol. 112] It Is Ordered and Adjudged that John E. Madden, deceased, was the owner of the following described intangible personal property on the following respective assessing dates, to-wit:

On July 1st, 1924, credits, consisting of money on deposit in banks in the City of New York, of the fair cash value of $63,900.00;

On July 1st, 1925, credits, consisting of money on deposit in banks in the city of New York, of the fair cash value of $56,100.00;

On July 1st, 1926, credits, consisting of money on deposit

in banks in the city of New York, of the fair cash value of $99,900.00;

On July 1st, 1927, credits, consisting of money on deposit in banks in the city of New York, of the fair cash value of $58,900.00;

On July 1st, 1928, credits, consisting of money on deposits in banks in the city of New York, of the fair cash value of $40,000.00;

On July 1st, 1929, credits, consisting of money on deposit in banks in the city of New York, of the fair cash value of $58,100.00, and the promissory note of Mrs. P. P. Flaherty of the fair cash value of $1,500.00, and the promissory note of W. B. Miller of the fair cash value of $11,000.00, making a total of $70,600.00; and that said John E. Madden, on each of said assessing dates, was a resident and citizen of Fayette County, Kentucky, and that said property had a taxable situs in Fayette County, Kentucky, on each of said assessing dates, and It Is Ordered and Adjudged that both [fol. 113] John E. Madden and John E. Madden, Jr. Executor of the estate of John E. Madden, deceased, failed to list or assess any of said property for state taxes for any of said respective years, and therefore, said property and all thereof was wholly omitted from assessment and taxation for each of said years.

It is Further Ordered and Adjudged that the defendant, John E. Madden, Jr., Executor of the estate of John E. Madden, deceased, be and he is hereby assessed and taxed with the following intangible property for the following respective years at the following assessed valuations for state of Kentucky ad valorem taxes, to-wit:

For the year 1924, credits represented by deposits of money of John E. Madden, deceased, in banks in the city of New York, at the fair cash value of $63,900.00;

For the year 1925, credits represented by deposits of money of John E. Madden, deceased, in banks in the city of New York, at the fair cash value of $56,100.00;

For the year 1926, credits represented by deposits of money of John E. Madden, deceased, in banks in the city of New York, at the fair cash value of $99,900.00;

For the year 1927, credits represented by deposits of money of John E. Madden, deceased, in banks in the city of New York, at the fair cash value of $58,900.00;

For the year 1928, credits represented by deposits of

money of John E. Madden, deceased, in banks in the city of New York, at the fair cash value of $40,000.00;

For the year 1929, credits represented by deposits of money of John E. Madden, deceased, in banks in the city of New York, at the fair cash value of $58,100.00 and the promissory note of Mrs. P. P. Flaherty, of the fair cash [fol. 114] value of $1,500.00, and the promissory note of W. B. Miller, of the fair cash value of $11,000.00, making a total fair cash value of $70,600.00.

It Is Further Ordered and Adjudged that the defendant, John E. Madden, Jr. Executor of the estate of John E. Madden, deceased, be and he is assessed and taxed for the state of Kentucky ad valorem taxes at the rate or levy of 50¢ on each $100.00 of valuation of said respective valuations for said respective years.

It Is Further Ordered and Adjudged that plaintiff shall recover interest from the defendant on each year's taxes herein assessed at 6% per annum—the term of the interest shall be from December 31st, 1925, to date hereof on the taxes assessed as of July 31st, 1924; the term of the interest shall be from December 31st, 1926 to date hereof on the taxes assessed as of July 1, 1925; the term of the interest shall be from December 31st, 1927 to date hereof on the taxes assessed as of July 1st, 1926; the term of the interest shall be from December 31st, 1928, to date hereof on the taxes assessed as of July 1st, 1927; the term of the interest shall be from December 31st, 1929 to date hereof on the taxes assessed as of July 1st, 1928; the term of the interest shall be from December 31st, 1930 to date hereof on the taxes assessed as of July 1st, 1929.

It Is Further Ordered and Adjudged That The plaintiff have and recover from the defendant a penalty of 100% of the taxes assessed by this final judgment for defendant's failure to assess the aforesaid omitted property.

[fol. 115] It is Further Ordered and Adjudged that M. J. Brennan, as Revenue Agent for the State at Large, prosecuted this action, and that he is entitled to recover and have judgment for 20% of the amount of the taxes recovered herein.

It is Further Ordered and Adjudged that plaintiff is entitled to its costs expended herein.

It is Further Ordered and Adjudged that the plaintiff is entitled to recover the following sums from the defen-

dant, John E. Madden, Jr., Executor of the estate of John E. Madden, deceased, and the plaintiff is hereby awarded judgment against the said defendant for the following amounts, to-wit:

The sum of $1,947.00 as State Taxes;

The sum of $1,120.10 as Accrued Interest on the taxes;

The sum of $1,947.00 as a penalty of 100% as provided by Section 4019a-12, Kentucky Statutes, which is owing to the state because said property was omitted from assessments;

The sum of $389.40 as a penalty of 20% of the taxes owing for the use and benefit of M. J. Brennan, former Revenue Agent for the State at Large, who prosecuted this action;

And for the costs of this action in the sum of $369.93.

It is Further Ordered and Adjudged that the Clerk of this court enter this judgment and order of assessment and certify same to the Sheriff of Fayette County, the County Court Clerk of Fayette County, and the Commissioner of [fol. 116] Revenue of the state of Kentucky, and that the Sheriff of this county collect the tax, interest, state penalty of 100% of the taxes, and the costs and 20% penalty as other taxes are collected.

It is Further ordered and Adjudged that the plaintiff have and recover from the defendant, John E. Madden, Jr., Executor of the estate of John E. Madden, deceased, interest on said respective sums adjudged to plaintiff at the rate of 6% per annum from the date of the entry of this final judgment until said sums are paid.

Smauel H. Cole, County Attorney of Fayette County, Kentucky, was present and assisted at the trial of this cause, and therefore, is entitled to; and the Sheriff shall pay him, 15% of the amount recovered.

This final judgment may be executed immediately.

To all of the foregoing rulings and final judgment, the defendant excepts and objects.

Dated this 22nd day of January, 1938.

IN CIRCUIT COURT OF FAYETTE COUNTY

ORDER OVERRULING MOTION FOR NEW TRIAL, ETC.

Came the defendant, herein, and filed Motion for Separate Findings of Fact and Conclusions of Law and the

Court being sufficiently advised it is ordered that said Motion be and it hereby is overruled to which findings of the Court the defendant objects and excepts.

Came the defendant, herein, and filed his Motion and Grounds for a new trial in open Court on January 22nd, 1938, and the Court being sufficiently advised it is Ordered that said Motion for a new trial be and it hereby is overruled to which ruling of the Court the defendant objects and excepts and prays an appeal to the court of Appeals [fol. 117] of Kentucky which is granted and the defendant is given sixty (60) days within which time to file his Bill of Exceptions herein.

In Circuit Court of Fayette County

Motion for Separate Findings of Fact and Conclusions of Law—Filed January 22, 1938

The defendant, John E. Madden, Jr., Executor of the estate of John E. Madden, deceased, moves the Court for an order making separate findings of fact and conclusions of law herein, and he submits herewith his request for separate findings of fact and conclusions of law.

Bruce and Bullitt, Wm. A. Minihan, Counsel for the Defendant.

[fol. 118] In Circuit Court of Fayette County

Findings of Fact and Conclusions of Law—Filed January 22, 1938

The Court makes the following findings of fact and conclusions of law in connection with the judgment herein.

Findings of Fact

On the first trial of this cause, this Court found the fact to be with reference to the assessment of bank accounts by the State of Kentucky, as follows:

"It is the universal practice in Kentucky to assess bank accounts at the rate of 1/10th of 1% based upon the amount of such deposits on July 1st, of each year, and such universal practice prevailed during the years 1924 to 1929, inclusive."

In the opinion of the Court of Appeals herein handed down June 23rd, 1936, such finding of this Court was not reversed or disapproved, and as there was no contrary evidence offered on the second trial, the said finding of this Court on the first trial is hereby readopted and reaffirmed (Record on first appeal, Page 127).

CONCLUSIONS OF LAW

1. The decedent, John E. Madden, was a citizen of the [fol. 119] United States as well as a citizen of the State of Kentucky, and under the Constitution of the United States, Article IV, Section 2, and the Fourteenth Amendment thereto, Section 1, no state law can be made or enforced which will abridge the privileges and immunities of a citizen of the United States. The assessment and collection of taxes by the State of Kentucky upon bank accounts kept by a citizen thereof in banks outside the State of Kentucky, at a higher rate than that applied to bank accounts kept within the State of Kentucky, is discriminatory and violates the said provisions of the Constitution of the United States.

2. Since, as found by this Court upon the first trial, it is, and was, during the years 1924 to 1929, inclusive, the universal practice in Kentucky to assess bank accounts at the rate of 1/10th of 1% of the amount of deposits on July 1st of each year, the assessment and collection of taxes against this defendant at a higher rate of taxation than has been applied, by such universal practice, to other taxpayers within the State of Kentucky, has the effect of denying to this defendant due process of law and the equal protection of the laws as guaranteed by the Fourteenth Amendment to the Constitution of the United States.

[fol. 120] IN CIRCUIT COURT OF FAYETTE COUNTY

MOTION AND GROUNDS FOR NEW TRIAL

The defendant, John E. Madden, Jr. moves the Court to vacate the decision herein and the judgment entered thereon and to grant him a new trial for the following causes, each of which affects materially his substantial rights:

1. The decision is not sustained by sufficient or any evidence.

2. The Court's decision is contrary to law in that (a) if bank accounts kept outside the State of Kentucky are taxed at a different rate from those kept within the State of Kentucky, such action is in violation of Kentucky Constitution Section 171 because bank accounts regardless of where kept are of the same general class of property and cannot be assessed at wholly different rates without violating the uniformity required by Kentucky Const. * 171 and (b) the decedent, John E. Madden, was a citizen of the United States as well as a citizen of the State of Kentucky, and under the Constitution of the United States, Article IV, * 2, and the Fourteenth Amendment thereto, * 1, no state law could be made or enforced which should abridge his privileges and immunities as a citizen of the United States, and if a discriminatory tax is placed upon bank [fol. 121] accounts kept by him outside the State of Kentucky greater than such taxes imposed upon Kentucky bank accounts, the acts creating such discriminatory taxation would have the effect of violating all such constitutional provisions and of abridging his privileges and immunities as a citizen of the United States;

Wherefore, the defendant prays that the judgment herein be set aside.

W. A. Minihan, Bruce & Bullitt, Counsel for Defendant.

[fols. 122-123] Supersedeas bond on appeal omitted in printing.

[fols. 124-128] In Circuit Court of Fayette County

Supersedeas

I do certify that an appeal has been granted by the Fayette Circuit Court from a judgment rendered January 22nd, 1938, in favor of Commonwealth of Kentucky by James W. Martin, Commissioner of Revenue, Appellee, against John E. Madden, Jr., Executor of the estate of John E. Madden, deceased, Appellant, for the sum of $1,947.00 as State taxes; the sum of $1,120.10 as Accrued interest on the taxes; the sum of $1,947.00 as a penalty of 100%; the sum of $389.40 as a penalty of 20% of the taxes; and for the costs of this action, herein expended; and that a super-

sedeas bond has been executed. Therefore, the appellee and all others are commanded to stay proceedings on the judgment above recited.

Witness my hand as Clerk of said court, this 28th day of February, 1938.

Attest: Geo. E. DeLong, C. F. C. C.

[fols. 129-130] IN COURT OF APPEALS OF KENTUCKY

APPEAL FROM A JUDGMENT OF THE FAYETTE CIRCUIT COURT

JOHN E. MADDEN'S EXECUTOR (JOHN E. MADDEN, JR.), Appellant

vs.

COMMONWEALTH OF KENTUCKY, by J. W. Martin, Commissioner of Revenue, Appellee

JUDGMENT—March 10, 1939

The Court being sufficiently advised, it seems to them there is no error in the judgment herein.

It is therefore considered that said Judgment be affirmed and that the appellee recover of the appellant ten percent damages on the amount of the judgment superseded herein, Which is ordered to be certified to said Court.

Chas. K. O'Connell, C. C. A., by Alice Griffin, D. C.

Issued April 15, 1939.

[fol. 131] IN COURT OF APPEALS OF KENTUCKY

APPEAL FROM FAYETTE CIRCUIT COURT

JOHN E. MADDEN'S EXECUTOR, Appellant

v.

COMMONWEALTH OF KENTUCKY, by James W. Martin, Commissioner of Revenue, Appellee

OPINION OF THE COURT BY COMMISSIONER MORRIS AFFIRMING —March 10, 1939

This case is before us on a second appeal. Commonwealth v. Madden's Ex'r., 265 Ky. 685, 97 S. W. (2) 561.

Reference thereto will show that the court held the bank deposits of decedent in banks outside of Kentucky subject to the rate of fifty cents per $100.00, as is other intangible property (sec. 4019a-10) and not as provided by sec. 4019a-1 Ky. Stats., fixing the rate on deposits in domestic banks at ten cents per $100.00.

We reversed so much of the judgment of the lower court as held the statute contrary to the provisions of the Federal Constitution, which was the sole issue before the lower court, and here on this phase of the case. On remand for [fol. 132] a new trial for proceedings consistent with our opinion, appellant tendered an amended answer, which was filed without objection, and to which appellee replied, denying its allegations, save such as plead that decedent was a citizen of the United States and Kentucky.

The court overruled appellee's motion to strike the answer from the files. Counsel for appellee is now complaining of the court's ruling, because following reversal it came too late, and injected new matter which might have been plead in the former defensive pleadings. Our conclusions, later expressed, obviate the necessity of passing on this technical question, since it is doubtful if the amendment presented any new defensive matter, it being as we view it a mere elaboration of the legal defense set up in the former pleadings. (Civil Code, sec. 134). Furthermore, the issue presented was fully considered and decided in the former opinion. Counsel for appellee contends that the first opinion is the law of the case.

After pleading (the admitted fact) that decedent was a citizen of the United States, and a citizen and resident of Kentucky, appellant averred that to construe the statute so as to impose the higher rate on deposits in foreign banks than on deposits in domestic banks, as we had done, violated sec. 2 of Article 4 of the United States Constitution, and sec. 1 of the 14th Amendment, which respectively provide in part:

"The citizens of each state shall be entitled to all privileges and immunities of citizens of the several states. * * * No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States."

[fol. 133] It appears from appellant's pleadings that counsel had relied on so much of the 14th amendment to

the Federal Constitution as prohibited the taking of property without due process of law, and as guaranteed equal protection of the laws.

In the brief, which is in the nature of a petition for rehearing, it is contended that in view of the ruling of the Supreme Court, in the case of Colgate v. Harvey, 296 U. S. 404, this court should reconsider and reverse its finding, insisting that the Colgate case is controlling, and that the "law of the case" rule should not be applied "where a question of constitutional law is involved, as no former decision can prevail over the Constitution."

Reading the opinion it is perceivable that in considering this phase of the case the court did so with the Colgate opinion before it, adverted to and quoted from it, discussing the question at hand in its light and the light of those provisions of the Federal Constitution set up in the final pleading.

Appellant after filing amended answer, and upon appellee's motion for judgment in conformity with the opinion, moved the court to make separate findings of fact and conclusions of law, and the court in response to the request wrote:

"On the first trial of this cause, this Court found the fact to be with reference to the assessment of bank accounts by the State of Kentucky, as follows:

" 'It is the universal practice in Kentucky to assess bank accounts at the rate of 1/10th of 1% based upon the amount of such deposits on July 1, of each year, and such universal practice prevailed during the years 1924 to 1929, inclusive.' [fol. 134] "In the opinion of the Court of Appeals herein handed down June 23rd, 1936, such finding of this court was not reversed or disapproved, and as there was no contrary evidence offered on the second trial, the said finding of this Court on the first trial is hereby readopted and reaffirmed.

"1. The decedent * * * was a citizen of the United States as well as a citizen of the State of Kentucky, and under the Constitution of the United States, Article IV, Section 2, and the Fourteenth Amendment thereto, Section 1, no state law can be made or enforced which will abridge the privileges and immunities of a citizen of the United States. The assessment and collection of taxes by the State

of Kentucky upon bank accounts kept by a citizen thereof in banks outside the State of Kentucky, at a higher rate than that applied to bank accounts kept within the State of Kentucky, is discriminatory and violates the said provisions of the Constitution of the United States.

"2. Since, as found by this Court upon the first trial, it is, and was, during the years 1924 to 1929, inclusive, the universal practice in Kentucky to assess bank accounts at the rate of 1/10th of 1% of the amount of deposits on July 1st of each year, the assessment and collection of taxes against this defendant at a higher rate of taxation than has been applied, by such universal practice, to other taxpayers within the State of Kentucky, has the effect of denying to this defendant due process of law and the equal [fol. 135] protection of the laws as guaranteed by the Fourteenth Amendment to the Constitution of the United States."

The finding of fact as stated by the court would have been more accurate, and conformable to the proof had it read, "• • • it was, during the years involved, the practice in Kentucky to levy the rate of 1/10th of 1% on all deposits in Kentucky banks as of July 1st each year, and to levy the higher rate on deposits by residents *by residents* of Kentucky in foreign banks".

Notwithstanding this expression of his conclusions of law, the court following the mandate, entered judgment against appellant for taxes covering the several years involved, applying the higher rate provided by the statute supra, and it is solely from this judgment the appeal is prosecuted.

In assessing bank deposits in and out of the State, officers charged with such duties followed the provisions of the statute, (Sections 4019a-1, 4019a-10) and applied the respective provided rates. With the correction indicated we have no hesitancy in approving the finding of fact by the chancellor as to methods applied during the respective years involved.

However, we cannot lend our approval to the conclusions of law expressed by him. The facts adverted to by the lower court were in the mind of this court in passing on the question presented. We expressly determined that the provisions of the Federal Constitution relied on by appellant were not violated. The conclusions of law thus are in the

[fols. 136-137] face of our former decision. We adhere to the conclusion reached on the former hearing and as expressed in our opinion. The chancellor's judgment conformed to our mandate on the first appeal even though his conclusions of law did not.

Judgment affirmed.

Attorneys for Appellant: Wm. Marshall Bullitt, Louisville, Kentucky; Leo T. Wolford, Louisville, Kentucky; Wm. A. Minihan, Lexington, Kentucky.
Attorney for Appellee: Harry D. Kremer, Security Trust Building, Lexington, Kentucky.

[fol. 138] IN COURT OF APPEALS OF KENTUCKY

[Title omitted]

PETITION FOR APPEAL FROM THE COURT OF APPEALS OF KENTUCKY TO THE SUPREME COURT OF THE UNITED STATES—Filed May 9, 1939

To the Chief Justice of the Court of Appeals of Kentucky:

Your petitioner, John E. Madden, Jr., Executor of the Estate of John E. Madden, deceased (hereinafter called the Executor), respectfully shows:

1. The petitioner is the appellant in the above entitled cause.

2. The appeal in such cause was from a judgment rendered in a civil action on January 22, 1938 by the Fayette Circuit Court of Kentucky against the Executor and in favor of the Commonwealth of Kentucky, the respondent herein, upon the trial of said cause.

3. On appeal by the Executof from such judgment to the Court of Appeals of Kentucky (which Court is the highest court of law and equity in the state of Kentucky in which a decision of the matter in controversy could be had), the judgment appealed from was affirmed by the final judgment entered in the Court of Appeals of Kentucky on March 10, 1939, and the opinion of such Court was filed on March 10, 1939.

[fol. 139] 4. There is error in the final judgment and the record of proceedings in such cause in the Court of Appeals of Kentucky, whereby the Executor is aggrieved in that there was drawn in question the validity of Kentucky Statutes, Section 4019a-10 and Section 4019 as construed by the Court of Appeals of Kentucky. John E. Madden, deceased, was a citizen of the State of Kentucky and he had moneys deposited in banks located outside the State of Kentucky, to-wit: in New York Banks. The Court of Appeals of Kentucky has construed such Kentucky Statutes as requiring the Executor to pay taxes upon such moneys so deposited by his decedent in banks located outside the State of Kentucky at the rate of 50 cents upon each $100.00 thereof, whereas by Kentucky Statutes, Section 4019a-1, moneys deposited in banks located within the State of Kentucky are taxed at the rate of only one-tenth of one per cent thereof. The Court of Appeals of Kentucky held in such decision, against the contention of the Executor, that such Kentucky Statutes, as construed by it, requiring the payment of taxes at a higher rate upon moneys deposited in banks located outside the State of Kentucky than is required upon moneys deposited in banks located within the State of Kentucky, by residents thereof, do not violate the privileges and immunities clauses of Article IV, Section 2, or the Fourteenth Amendment, Section 1, of the Constitution of the United States, and that they do not violate the equal protection or due process clauses of the Fourteenth Amendment Section 1, of the Constitution of the United States; and the decision and judgment of the Court of Appeals of Kentucky sustained the tax against the Executor and such Court rendered its decision in favor of the legality of the tax and the validity of such Statutes of the State of Kentucky.

[fols. 140-143] Wherefore, your petitioner prays for the allowance of an appeal from the said Court of Appeals of Kentucky to the Supreme Court of the United States in order that such decision and judgment of the Court of Appeals of Kentucky may be examined and reversed, and it also prays that a transcript of the record, proceedings and papers in this case, duly authenticated by the Clerk of the Court of Appeals of Kentucky may be sent to the Supreme Court of the United States, as provided by law.

The executor further prays that the appeal herein may

be a supersedeas; that an order be made fixing the security required; that on approval of such security, such appeal may be allowed as a supersedeas.

The errors upon which your petitioner claims to be entitled to an appeal are those hereinbefore indicated and which are more fully set out in the Assignment of Errors filed herewith.

Dated this May 9, 1939.

Bruce & Bullitt, Counsel for the Appellant and Petitioner herein.

[fol. 144] IN COURT OF APPEALS OF KENTUCKY

[Title omitted]

ASSIGNMENT OF ERRORS—Filed May 9, 1939

John E. Madden, Jr., Executor of the Estate of John E. Madden, deceased, (hereinafter called the Executor) Appellant herein, and as appellant to the Supreme Court of the United States from the judgments and decisions heretofore entered herein, assigns the following errors in connection with his petition for appeal to the Supreme Court of the United States.

The Court of Appeals of Kentucky erred in affirming the judgment of the Fayette Circuit Court in John E. Madden's Executor against Commonwealth of Kentucky, 277 Ky. 343, decided March 10, 1939,

(1) In holding that the Executor could and should be taxed at the rate of 50 cents on each $100.00 of deposits of money in banks located outside the State of Kentucky, thus requiring the Executor to pay taxes under Carroll's Ken-[fol. 145] tucky Statutes, Section 4019a-10 on such money deposited in banks located outside the State of Kentucky at the rate of 50 cents upon each $100.00 thereof, prescribed by Carroll's Kentucky Statutes, Section 4019, whereas similar deposits of money in banks located within the State of Kentucky are taxed for the same purposes at the rate of only one-tenth of one per cent upon the amount of such deposits (Carroll's Kentucky Statutes, Section 4019a-1), thereby abridging the privileges and immunities of the Executor as a citizen of the United States in violation of

Article IV, Section 2 and of the Fourteenth Amendment, Section 1 of the Constitution of the United States.

(2) In holding that the Executor could and should be taxed at the rate of 50 cents on each $100.00 of deposits of money in banks located outside of the State of Kentucky, thus requiring the Executor to pay taxes under Carroll's Kentucky Statutes, Section 4019a-10 on such money deposited in banks located outside of the State of Kentucky at the rate of 50 cents on each $100.00 thereof, prescribed by Carroll's Kentucky Statutes, Section 4019, whereas similar deposits of money in banks located within the State of Kentucky are taxed for the same purposes at the rate of only one-tenth of one per cent upon the amount of such deposits (Carroll's Kentucky Statutes, Section 4019a-1), thereby depriving the Executor of his property without due process of law and denying to him the equal protection of the laws as guaranteed to him by the Fourteenth Amendment, Section 1, of the Constitution of the United States.

(3) In holding, adjudging and deciding that Kentucky Statutes, Section 4019a-10 and Section 4019, as construed by the Court of Appeals of Kentucky, do not abridge the privileges and immunities of the Executor as a citizen of [fols. 146-176] the United States, in violation of Article IV, Section 2, and of the Fourteenth Amendment, Section 1 of the Constitution, in requiring him to pay taxes upon money deposited in banks located outside the State of Kentucky at the rate of 50 cents upon each $100.00 thereof, whereas by Kentucky Statutes, Section 4019a-1, money deposited in banks within the State of Kentucky is taxed at the rate of only one-tenth of one per cent thereof.

(4) In holding, adjudging and deciding that Kentucky Statutes, Section 4019a-10 and Section 4019, as construed by the Court of Appeals of Kentucky, do not deprive the Executor of his property without due process of law or deny to him the equal protection of laws in violation of the Fourteenth Amendment, Section 1, of the Constitution of the United States in requiring him to pay taxes upon money deposited in banks located outside the State of Kentucky at the rate of 50 cents upon each $100.00 thereof, whereas by Kentucky Statutes, Section 4019a-1, money deposited in banks located within the State of Kentucky is taxed at the rate of only one-tenth of one per cent thereof.

For which errors, the appellant, John E. Madden, Jr., Executor of the Estate of John E. Madden, deceased, prays that the judgment of the Court of Appeals of Kentucky be reversed and that a judgment be rendered in favor of John E. Madden, Jr., Executor of the Estate of John E. Madden, deceased.

Dated May 9, 1939.

John E. Madden, Jr., Executor of the estate of John E. Madden, deceased. By Bruce & Bullitt, Counsel.

[fol. 177] In Court of Appeals of Kentucky

[Title omitted]

Order Allowing Appeal—Filed May 9, 1939

This day came John E. Madden, Jr., Executor of the Estate of John E. Maden, deceased, and filed herein his petition for appeal to the Supreme Court of the United States from the Court of Appeals of Kentucky, his assignment of errors in connection therewith, statement as to the jurisdiction of the Supreme Court of the United States, and it appearing from the record of the above entitled cause that there was drawn in question the illegality of the tax sought to be recovered by the Commonwealth of Kentucky under Carroll's Kentucky Statutes, Sections 4019a-10 and 4019; and that John E. Madden, Jr., Executor of the estate of John E. Madden, deceased, contended before the Court of Appeals of Kentucky that the tax sought to be collected by the Commonwealth of Kentucky, and that the Statutes under which such tax is sought to be collected by the Commonwealth of Kentucky, as construed and applied by the Court of Appeals of Kentucky, violate the privileges and immunities clauses of Article IV, Section 2, and the Fourteenth Amendment, Section 1, of the Constitution [fols. 178-179] of the United States; and that by its decision, this Court considered such matters urged by John E. Madden, Jr., Executor of the Estate of John E. Madden, deceased, and decided that neither such taxes sought to be recovered against him nor such Statutes of the State of Kentucky, as interpreted and construed by it, were repugnant to either of such provisions of the Constitution of the United States, and that the decision of this Court was in

favor of the legality of such tax and of such Statute of the State of Kentucky, as interpreted, construed and applied by this Court.

It is ordered that an appeal be, and hereby is, allowed to the Supreme Court of the United States from the Court of Appeals of Kentucky as prayed in such petition, and that the Clerk of this Court shall within thirty (30) days from this date prepare, certify and transmit to the Clerk of the Supreme Court of the United States, under his hand and seal of this Court, a transcript of the record and proceedings herein.

It is further ordered that the appellant, John E. Madden, Jr., Executor of the Estate of John E. Madden, deceased, shall execute bond with surety to be approved by the undersigned in the sum of $7,000.00, conditioned according to law, which bond shall operate as a supersedeas.

The said appellant now having presented a bond in the sum of $7,000.00 with the Aetna Casualty and Surety Company, as surety, it is ordered that the same be, and hereby it is, approved.

Dated May 9, 1939.

Alex L. Ratliff, Chief Justice of the Court of Appeals of Kentucky.

[fols. 180-182] Bond on Appeal for $7,000.00 approved and filed May 9, 1939 omitted in printing.

[fols. 183-184] Citation in usual form showing service on Harry D. Kremer omitted in printing.

[fol. 185] IN COURT OF APPEALS OF KENTUCKY

[Title omitted]

PRAECIPE FOR RECORD

To the Clerk of the Court of Appeals of Kentucky:

You are hereby requested to make a transcript of record to be filed in the Supreme Court of the United States, pursuant to an appeal allowed in the above entitled cause, and

to include in such transcript of record copies of the following papers, filed on the dates as follows, to-wit:

Plaintiff's Statement in Fayette County Court, Oct. 10, 1932.

Plaintiff's amended statement, Jan. 16, 1933.

Defendant's motion and answer, Feb. 14, 1933

Amended Answer, Feb. 25, 1933

Second Amended Statement, Oct. 3, 1933.

Third Amended Statement, Nov. 2, 1933

Amended Answer and Answer to Second and Third Amended Statements, Nov. 21, 1933.

Reply, Nov. 21, 1933.

Judgment and Order of Assessment of Fayette County Court, Dec. 29, 1933.

Summons on Appeal to Fayette Circuit Court, Jan. 2, 1934.

[fols. 186-192] Order, Mch. 27, 1934, Defendant's request for Findings of Fact and Conclusions of Law, Mch. 27, 1934.

Judgment Fayette Circuit Court, May 3, 1935.

Plaintiff's objection and exception to Judgment May 6, 1935.

Order, May 10, 1935.

Order and Opinion of Court of Appeals of Kentucky, June 23, 1936.

Defendant's request for Findings of fact and conclusions of law, June 26, 1937.

Amendment to Defendant's answer, June 26, 1937

Reply to Amended Answer, June 28, 1937

Order, Oct. 1, 1937; Judgment, Jan. 22, 1938.

Findings of Fact and Conclusions of Law, Jan. 22, 1938

Motion and Grounds for a New Trial, Jan. 22, 1938

Supersedeas Bond and Supersedeas, Feb. 28, 1938

Order and Opinion of Court of Appeals of Kentucky, Mch. 10, 1939.

The following papers in connection with the appeal to the Supreme Court of the United States:

Petition for Appeal

Assignment of Errors.

Separate Statement as to Jurisdiction required by paragraph 1 of Rule 12, of the Revised Rules of the Supreme Court of the United States

Order allowing appeal
Appeal Bond
Citation with Return or Admission of Service
Notice and Statement to Appellee, pursuant to Rule 12, paragraph 2.
This Praecipe.

Bruce & Bullitt, Attorneys for John E. Madden, Jr. Executor of the Estate of John E. Madden, deceased.

[fol. 193] IN SUPREME COURT OF THE UNITED STATES

[Title omitted]

ORDER EXTENDING TIME—May 26, 1939

This day came the appellant, John E. Madden, Jr., Executor of the Estate of John E. Madden, deceased, and the Court being advised and for good cause shown, it is ordered that the time within which said appellant shall docket this case and file the record thereof with the Clerk of the Supreme Court of the United States, is hereby enlarged and extended to, and including, June 15, 1939.

(Signed) Alex L. Ratliff, Chief Justice of the Court of Appeals of Kentucky.

[fol. 194] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 195] IN SUPREME COURT OF THE UNITED STATES

APPELLANT'S STATEMENT OF THE POINTS UPON WHICH HE INTENDS TO RELY AND DESIGNATION TO PRINT ENTIRE RECORD —Filed June 14, 1939

To the Clerk of the Supreme Court of the United States:

The appellant, John E. Madden, Jr., Executor of the Estate of John E. Madden, deceased (hereinafter called the Executor) hereby files this, his definite statement of the points on which he intends to rely and of the parts of the record which he thinks necessary for the consideration

thereof, pursuant to the requirements of Rule 13, Paragraph 9 of the Revised Rules of the Supreme Court of the United States.

[fol. 196] Statement of the Points on Which the Executor Intends to Rely

1. The Court of Appeals of Kentucky erred in holding that the Executor could and should be taxed at the rate of 50 cents on each $100.00 of deposits of money in banks located outside the State of Kentucky, thus requiring the Executor to pay taxes under Carroll's Kentucky Statutes, Section 4019a-10 on such money deposited in banks located outside the State of Kentucky at the rate of 50 cents upon each $100.00 thereof, prescribed by Carroll's Kentucky Statutes, Section 4019, whereas similar deposits of money in banks located within the State of Kentucky are taxed for the same purposes at the rate of only one-tenth of one per cent upon the amount of such deposits (Carroll's Kentucky Statutes, Section 4019a-1), thereby abridging the privileges and immunities of the Executor as a citizen of the United States in violation of Article IV, Section 2, and of the Fourteenth Amendment, Section 1, of the Constitution of the United States.

2. The Court of Appeals of Kentucky erred in holding that the Executor could and should be taxed at the rate of 50 cents on each $100.00 of deposits of money in banks located outside the State of Kentucky, thus requiring the Executor to pay taxes under Carroll's Kentucky Statutes, Section 4019a-10 on such money deposited in banks located outside of the State of Kentucky at the rate of 50 cents on each $100.00 thereof, prescribed by Carroll's Kentucky Statutes, Section 4019, whereas similar deposits of money in banks located within the State of Kentucky are taxed [fol. 197] for the same purposes at the rate of only one-tenth of one per cent upon the amount of such deposits (Carroll's Kentucky Statutes, Section 4019a-1), thereby depriving the Executor of his property without due process of law and denying to him the equal protection of the laws as guaranteed to him by the Fourteenth Amendment, Section 1, of the Constitution of the United States.

3. The Court of Appeals of Kentucky erred in holding, adjudging and deciding that Kentucky Statutes, Section

4019a-10 and Section 4019, as construed by the Court of Appeals of Kentucky, do not abridge the privileges and immunities of the Executor as a citizen of the United States in violation of Article IV, Section 2, and of the Fourteenth Amendment, Section 1 of the Constitution, in requiring him to pay taxes upon money deposited in banks located outside the State of Kentucky at the rate of 50 cents upon each $100.00 thereof, whereas by Kentucky Statutes, Section 4019a-1, money deposited in banks within the State of Kentucky is taxed at the rate of only one-tenth of one per cent thereof.

4. The Court of Appeals of Kentucky erred in holding, adjudging and deciding that Kentucky Statutes, Section 4019a-10 and Section 4019, as construed by the Court of Appeals of Kentucky, do not deprive the Executor of his property without due process of law or deny to him the equal protection of the laws in violation of the Fourteenth Amendment, Section 1, of the Constitution of the United States in requiring him to pay taxes upon money deposited in banks located outside the State of Kentucky at the rate of 50 cents upon each $100.00 thereof, whereas by Kentucky Statutes, Section 4019a-1, money deposited in banks located [fol. 198] within the State of Kentucky is taxed at the rate of only one-tenth of one per cent thereof.

The Assignment of Errors heretofore filed by the Executor with the Clerk of the Court of Appeals of Kentucky contains in full all of the points upon which the Executor intends to rely on this appeal. Such Assignment of Errors is hereby expressly referred to by the Executor and is hereby incorporated herein by reference for all purposes.

Designation of the Parts of the Record which the Executor Deems Necessary for the Consideration of the Points Above Set Forth

Pursuant to Rule 13, Paragraph 9 of the Revised Rules of the Supreme Court of the United States, the Executor hereby designates the parts of the record in the above entitled action which he thinks necessary for the consideration of the points above set forth:

The entire record docketed in the above entitled cause with the exception of captions, titles and verifications.

Dates June 6, 1939.

Wm. Marshall Bullitt, Leo T. Wolford, Counsel for John E. Madden, Jr., Executor of the Estate of John E. Madden, deceased.

Receipt of the foregoing statement is hereby admitted this 8th day of June, 1939.

Harry D. Kremer, Counsel for Commonwealth of Kentucky; by James W. Martin, Commissioner of Revenue of the Commonwealth of Kentucky.

[fol. 199] [File endorsement omitted.]

[Endorsed on cover:] Enter Wm. Marshall Bullitt. File No. 43,499, Kentucky, Court of Appeals; Term No. 92. John E. Madden, Jr., Executor of the Estate of John E. Madden, Deceased, Appellant, vs. Commonwealth of Kentucky, by James W. Martin, Commissioner of Revenue of the Commonwealth of Kentucky. Filed June 8, 1939. Term No. 92 O. T. 1939.